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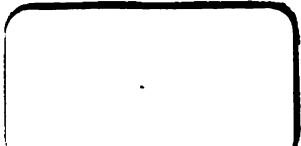
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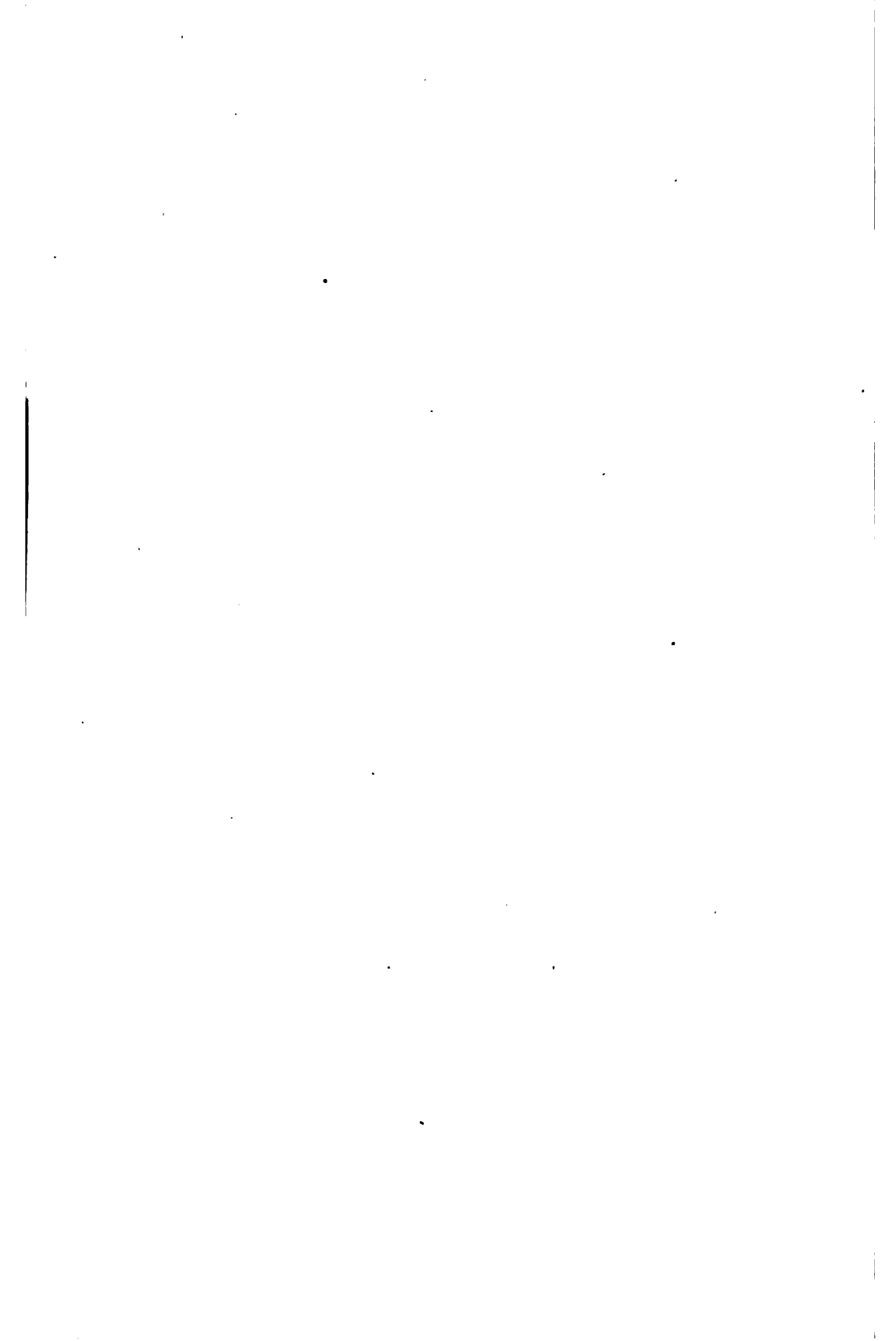




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THE

**LAW QUARTERLY**

**REVIEW.**

EDITED BY

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# THE LAW QUARTERLY REVIEW.

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## NOTES.

THE Lord Chief Justice's address on legal education, delivered on October 28 on the occasion of the Inns of Court lectures being thrown open, has called forth a certain amount of discussion. It remains to be seen whether any effectual movement will ensue. Lord Russell of Killowen's eloquence, with the Gresham University project in the background, may possibly convince those who would not listen to Lord Selborne; but we doubt. On one point we do not follow the Lord Chief Justice. Why should the Inns of Court seek a Royal Charter for their law school? A Charter, or even an Act of Parliament, for the new London University by all means, when it is made: but all things needful, so far as the Inns are concerned, can be done as well without a Charter if they are willing. And if the Inns are not willing, nothing short of an Act of Parliament will serve.

The following memorandum on Law Teaching in the Universities, prepared by Prof. Goudy of Oxford, has the general assent of the Professors and Readers in the Faculty of Law, reserving further consideration as to the details of the suggested curriculum, which are given provisionally by way of illustrating the application of the principles laid down.

'The Universities can only with propriety undertake the teaching of law on its *theoretical* side. For practical training it is necessary that the student should attend the Courts and work in a barrister's or a solicitor's chambers, and provision for this practical training should be made by the Inns of Court and the Incorporated Law Society.

In every law student's career (I speak of those who attend a University) there ought to be an examination at the close of his academic study, success in which should be rewarded by a degree and by admission to the second stage in his education—the practical training. At the close of the latter he should, if successful, be admitted to the Bar or to practise as a solicitor, as the case may be.

The evil of the present system is that the theoretical and practical study are not kept distinct. The lectures and professional



examinations in London are a medley of both. Consequently a student acquires his knowledge in an unsystematic and piecemeal fashion, and begins his professional work under great disadvantages.

What is meant by *theoretical training*? I think it should embrace a study of the following topics, and that three years should, if possible, be given to it, under some such arrangement as follows:—

First Year. Roman Law and Jurisprudence. As regards this there should be no doubt. Modern law can only be understood with any thoroughness by entering at the portals of Roman Law and Jurisprudence. A whole year should be devoted to them; less would be useless; and they should be studied exclusively. To take up these subjects in the middle or towards the close of a curriculum, as so many do, is but to confuse the mind and immensely increase the labour of the student.

Second Year. History of English Real Property, English Common Law, and International Law.

Third Year. Constitutional Law, Outlines of Equity and Criminal Law.

At the end of three years the normal student should have a fair knowledge of these topics, and should be examined in them for his degree. Stress, however, should be principally laid upon Roman Law, Jurisprudence, History of English Law, and Constitutional Law; the other topics cannot be expected to be known except in an elementary way.

As regards the non-university student, evidence of the same course of study at colleges and law schools should be required; but the cost of University education is now so moderate, and the wealth of the middle classes so much increased, that it may well be a question whether a University degree should not be insisted on, as is done in France and Germany, in every case. At any rate this might be done if a teaching university with an efficient Faculty of Law were created in London.

As to the *practical training*—two years should be devoted to this in a barrister's or a solicitor's chambers as the case may be. At the end of this period it may be a question whether the student should be examined by the Inns of Court or Incorporated Law Society in Practice, Pleading, Conveyancing, and also, more thoroughly than at his first examination, in Common Law and Equity.

At present no practical training seems to be required for admission to the Bar; it is left to the candidate's option, and apparently not more than one half of the intrants (if so many) attend chambers.

What the Universities, with much reason, complain of is that the honour degrees in law which they have conferred are not (except as regards Roman law) accepted by the Inns of Court and Incorporated Law Society as sufficient evidence even of theoretic knowledge. These professional bodies do not say that their own examinations demand a higher standard of proficiency; on the contrary, it is well known that they are considerably easier. [i. e. than the *honour* examinations at the Universities. There is no question of asking the Inns of Court to recognize any other.] Any one who will take the trouble to compare the papers set for the B.C.L. degree examinations at Oxford with those set for the Bar examinations will see that the former are vastly more testing; and yet not even the B.C.L. is accepted. The consequence is that students are harassed by preparing for examination in theoretical subjects, after they have left the Universities and should be devoting themselves to practical work, and the University teaching receives hardly any recognition.'

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Before I knew of Prof. Goudy's memorandum I had myself drawn up some shorter and rougher notes, purposely not entering on details, and submitted them to some of my friends and colleagues at both Universities, and persons of authority and experience in the matter in the Inns of Court; and I have already received indications of a considerable amount of assent. For this reason, and inasmuch as Prof. Goudy's notes and mine support one another by independent agreement in all essentials, I think it may be worth while to print these also.

I do not attempt to embody various suggestions I have received, as I cannot tell whether or how far any one of them, however much I may value it myself, would be approved of by others who have in a general way approved the principles.

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#### SUGGESTED BASIS FOR A SCHEME OF LEGAL EDUCATION.

##### *Part I.*

The Inns of Court Law School (which should ultimately incorporate, or become, the Law Faculty of the reconstituted University of London) to provide a course of instruction and examination in law so far as it can be learnt through books, lectures, and catechetical discussion. A degree or certificate to be given on satisfactory passing of the examination or examinations, but this should not alone be a title for call to the Bar.

##### *Part II.*

The Inns of Court, through the Law School, to provide a further test of a more practical kind (not necessarily or preferably by

examination), which should be required in addition to Part I to qualify for the Bar.

Part I to be open to all persons attending the Inns of Court Law School (as to possible arrangements with the Universities see below).

Part II only to student members of the Inns of Court.

*Co-operation of Incorporated Law Society.*

The Incorporated Law Society should, if possible, be invited to co-operate in the formation of the Law School and to be represented in its directing body, so that Part I of the proposed scheme might be made available for both branches of the profession. The Society would, like the Inns of Court, make such independent provision of its own for further practical qualification as it thought fit. The scheme could be started, however, as a scheme for the Bar alone if the suggested co-operation were not found practicable.

*Co-operation of Universities.*

The Universities (other than London) should also be invited to co-operate as to Part I, with a view to making the standard of their Law Schools and the Inns of Court Law School uniform. This could probably be done by giving the Inns of Court School representation on the University Boards of Studies or Faculty, or directly in the appointment of examiners. It might then be arranged that Part I could be taken at the Universities by a system of equivalent examinations (there would be no need to make them joint, identical or simultaneous).

The Universities would naturally use their own examinations, as they do now, for the purpose of conferring their own degrees in Arts or Laws.

*Independent functions of Universities and Inns of Court to be saved.*

The further evidence of advanced knowledge to be required for the Doctor's degree would of course remain, as now, within the exclusive province of each University.

On the other hand, the Inns of Court would continue to make their own rules as to keeping terms and other disciplinary matters, which would have to be satisfied among the other conditions of completing the qualification for the Bar under Part II.

*Necessity of Practical Qualification.*

It is an essential point in these suggestions that call to the Bar should no longer be attainable by a mere paper examination of the ordinary scholastic or competitive type. It may seem at first sight that this would involve hardship to some students; but it is believed that the class of students, if any, who would feel aggrieved would be precisely those whose presence in the Inns of Court and

enrolment in the English Bar are least desirable in their own interest as well as that of the profession [and, as one learned friend suggests, of the public].

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A quite different opinion is held by some persons whose opinion is entitled to great weight: namely, that a reformed scheme is desirable, but should be constructed by the Inns of Court without regard to the Universities or any external body. Whenever this opinion is stated in a form open to public discussion, we shall be prepared to state our reasons for dissenting from it.

F. P.

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No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious. 'If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element.'

This is the principle established or reaffirmed by the House of Lords in the *Mayor, &c. of Bradford v. Pickles*, '95, A. C. 587, 64 L. J. Ch. 759, and expressed by Lord Macnaghten in the words above quoted ('95, A. C. at p. 601).

'One person has a perfect right to advise another not to make a particular contract, and that other is at perfect liberty to follow that advice. But if the first person uses that persuasion with intent to injure the other, or to injure the person with whom he is going to make the contract, then the act is malicious, and the malice makes that unlawful which would otherwise be lawful.'

This is the principle, expressed in the words of Lord Esher, which is established or reaffirmed by the Court of Appeal in *Flood v. Jackson*, '95, 2 Q. B. (C. A.) 21, 38, 64 L. J. Q. B. 665, and on which we believe the House of Lords will shortly be called on to give a final decision.

The following result would appear to ensue. The malicious use which has regard to property is not in itself an abuse and illegal; but the malicious use of a right which has not reference to property is, or may be, an abuse, and is, or may be, illegal. As regards the exercise of the one class of rights, motive is irrelevant; as regards the exercise of the other class of rights, motive is, or may be, material.

No one need assert or maintain that this state of the law is either absurd or unjust; for it is open to any one to argue that the motive of a person who exercises his rights may in some cases be a matter which does not, and in other cases a matter which does, require consideration. But no one can deny that the present state

of the law has about it an air of paradox. And at least some lawyers who have thought a good deal about these questions will hope that the pending appeal to the House of Lords in *Flood v. Jackson* may be successful.

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The following note is communicated by a learned contributor:— A person who looks at legal principles rather with the eye of a legislator than of a lawyer may possibly be more inclined to regret the decision of the House of Lords in *Mayor, &c. of Bradford v. Pickles* than the decision of the Court of Appeal in *Flood v. Jackson*. There are, indeed, obvious and weighty reasons why courts of law should hesitate, as a general rule, to treat acts otherwise lawful as a breach of law because they are due to a bad or wrongful motive. Still there is no more reason in the nature of things why a court should not take into account the motives of a man's conduct than why a court should not take into account his intention. It is clear that, in the present state of society, rights otherwise legal may be exercised maliciously, i.e. with a view to the injury of others, and there is a good deal to be said in favour of the principle that the distinctly malicious exercise of a right, when the malice can be proved, may, whatever the nature of the right, be treated as an abuse and unlawful.

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We are unable to agree to this unless and until we know what 'malice' means. According to *Flood v. Jackson* it is anything a jury may think fit to call so. From this it would be only one step more to applying the supposed principle to business competition, and putting enterprise at the mercy of juries of rival tradesmen. If malice means personal spite or enmity, there is something to be said: but that will not serve to justify *Flood v. Jackson*. The defendants there had acted not from any personal motive, but in support of the supposed interest of their trade, and in furtherance of a rule which, rightly or not, they held binding on its members.

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The principle that it is an actionable wrong to hinder a man in his lawful business without just cause or excuse is admitted. If *A* persuades *P* to dismiss *X* from his service—*P* being entitled to do so without giving any reason at all—the questions seem to be, first, whether the act of depriving *X* of his employment can be regarded as *A*'s act, and afterwards whether *A* had any just cause or excuse. Now *P*'s act is by the supposition lawful as between *P* and *X*; for if not, there is nothing to discuss, the case being covered by settled authority. It would seem then that *X* may have a cause of action against *A* only if *P* was not really a free agent, so

that the act was *A's* and *A's* alone. It may be troublesome to prove that he was not: but it does not seem to us that the law should be strained and its principles confused in order to enable plaintiffs to avoid the burden of this proof.

It has long been supposed, on the strength of a passage in Bell's 'Principles,' that the law of Scotland does recognize inquiry into the motive or disposition which prompts a man to exercise his rights of property in a particular way, and that acts otherwise entitled to immunity may be treated as wrongful in a Scottish court if they are found as a fact to have been done 'in aemulationem vicini.' Lord Watson's judgment in *Pickles's* case ('95, A.C. at p. 598) shows that the import of a loosely worded term has been exaggerated, and that no such difference between the English and the Scottish systems really exists.

A wife persistently charges her husband with having committed an unnatural criminal offence. The charge is untrue. Yet the wife refuses to apologize, and reiterates it. Is such conduct cruelty which entitles the husband to a judicial separation?

This is the question raised by *Russell v. Russell*, '95, P. (C. A.) 315.

The majority of the Court of Appeal give the following answer: There must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it to constitute legal cruelty: the conduct therefore of the wife, detestable as it is, is not cruelty, and does not entitle the husband to a separation.

Lord Justice Rigby, on the other hand, replies that atrocious and repeated insult and indignity, which makes it an absolute impossibility that the duties of married life should be discharged, is cruelty, and entitles the husband or wife suffering from it to a judicial separation.

Which of these replies is to be treated as good law will, it is to be hoped, be finally decided by the House of Lords.

The question raised by *Russell v. Russell* is of supreme importance, and demands decision. When eminent lawyers and men of sound sense differ as to a rule of law, it becomes critics to speak and write with the utmost diffidence. The judgments in *Russell v. Russell* suggest the conclusion that if the definition of cruelty is to be determined by reference to precedents, the majority of the Court of Appeal have come to a right conclusion, but that, on the other hand, if the precedents are not decisive, and the definition of cruelty is to be determined by general considerations of expediency, then there is a great deal to be said in favour of Lord Justice Rigby's opinion. Common sense revolts at the idea that one of two married

people can deliberately and persistently heap indignity on the other and not entitle the victim to a judicial separation. Many laymen will feel that conduct which is atrociously cruel must amount to cruelty.

*Russell v. Russell*, as well as other notorious divorce cases, raises a very wide inquiry—Is not the time come for placing the law of divorce upon a broad and intelligible basis? There is a good deal to be said in favour of the old view that, in the interest of the nation, marriage ought to be indissoluble. But in spite of the arguments in favour of this doctrine, it has not for centuries been in effect the law of England, and it assuredly cannot at the present day be given the force of law. There is a great deal also to be said in favour of allowing the dissolution of a marriage in all cases in which the relation of the husband and the wife has become such that the duties of married life cannot by any possibility be discharged. But to persons who desire the law to be in conformity with the dictates of reason there appears little to be said in favour of the present system, which, while it recognizes that divorce may be a necessity, yet often forbids the dissolution of a marriage, though the conduct of one or both of the parties may have rendered it impossible that the duties of the marriage state should be performed. Should the House of Lords feel itself bound to affirm the decision of the Court of Appeal in *Russell v. Russell*, their lordships will force upon the public the necessity of reconsidering the whole of our law of divorce.

*In re Scott & Alvarez*, '95, 2 Ch. (C.A.) 603, 64 L.J. Ch. 821, exhibits our law—to the layman at least—in a singular light. A 'safe little investment' involving the purchaser in two lawsuits, two appeals, and threats of more, is perhaps not unknown before; the curious thing about the case is that we have here the old line of cleavage in our law reappearing—the contrast of the same contract seen through common law and equity spectacles. The purchaser had bound himself under the conditions of sale to assume the title good. He may have acted improvidently in doing so—in fact he soon discovered that he had—that he had given himself away; but what was the Court of Appeal to do? The contract was, so to speak, 'ower bad for blessing but ower guid for banning.' The court could not undo it—the purchaser must forfeit his deposit as the penalty of his indiscretion—but the court mercifully refused to go further and grant the vendor that special form of relief known as specific performance. It would indeed be nothing short of a mockery—the perfection of pedantry—for the court to force on a purchaser a title bad, not only in a conveyancing, but in a business sense.

The proposition contended for in *Sarson v. Roberts*, '95, 2 Q. B. (C. A.) 395, can hardly be stated without its absurdity becoming apparent. The furnished lodgings case—*Smith v. Marrable*, 11 M. & W. 5—we know. It was somewhat anomalous, but probably the picture of materfamilias driving about a seaside resort with a fly-load of children seeking rest and finding none appealed to the imagination of the judges who decided it. There is no time for leisurely inspection of the sanitary condition of the premises, for satisfying the maxim 'caveat emptor': but to say that a letter is to be taken to warrant the sanitary, structural or other condition of the premises for the residue of the term is preposterous. No human foresight on his part can guard against one of his other lodgers getting the scarlet fever or letting the tap run. If the tenant wishes to insure himself against such a contingency he must get a collateral warranty from the letter as he would if he bought a watch or a horse. The whole case really arose out of an absurd misunderstanding of a passage in Kelly C. B.'s judgment in *Wilson v. Finch Hatton*, 2 Ex. D. at p. 343, 46 L. J. Ex. 489, a case in which Lady Winchelsea took a furnished house in Belgravia for the London season and found a cesspool in the pantry which took a fortnight to remedy before she could go in: yet the landlord claimed the whole rent. What Kelly C. B. said was, that every day during which the house was unfit for habitation was a day taken from the tenancy, which of course it was, but a very different proposition.

*Mowbray v. Merryweather*, '95, 2 Q. B. 640 (C. A.), deals with a rather pretty point on remoteness of damage. *A* contracts to supply *M* with all necessary tackle for a certain piece of work to be done by *M* and his workmen, whereupon the law implies, as was admitted, a warranty that the tackle shall be reasonably fit for its purposes. *M* relies on this warranty and does not examine the tackle supplied. In fact a part of it is defective, and might have been found to be so by examination, and by reason of the defect *Z*, one of *M*'s workmen, is injured. *Z* recovers damages from *M*, under the Employers' Liability Act or otherwise. It is no answer to him for *M* to say 'I relied on my vendor's care to supply proper tackle.' But, as between *M* and *A*, *M* was entitled to rely on *A*'s warranty, and the injury to *M*'s workman, and *M*'s loss by having to pay him damages, are natural and probable results of that warranty being broken, and not too remote for the parties to have contemplated. Therefore *M* can recover over from *A* the compensation he has had to pay.

*Metropolitan Coal Consumers' Association v. Scrimgeour*, '95, 2 Q. B. 604 (C. A.), is a curious example of how the law is moulded by commercial



convenience. For years past judges have held and counsel have advised that a company cannot pay a commission to brokers to secure its capital being subscribed. But promoters and directors went on paying it all the same, and at last judicial opinion has veered round to the side of the city, and discovered that brokerage is no more heinous an expenditure than the cost of advertising a prospectus; in fact, less so. A company may spend an unconscionable sum on circulating its prospectus or remunerating its promoter, but it cannot spend more on brokerage than a reasonable commission—say 2½ per cent. To get its capital subscribed is a perfectly legitimate object for a company; indeed, to insure subscription is often indispensable. The owner of a good business will not sell it to a new company unless guaranteed against the company proving a fiasco. It may be said he should pay the brokerage himself; he often does, but in doing it he fixes his price to cover the commission, and it ultimately falls on the company. Abuses are more likely to occur in such a case than when the company itself pays the commission.

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Gifts to persons where a confidential relation exists are another instance of wholesale severity on the part of our law—a severity growing out of the ‘almost invincible jealousy,’ as Lord Eldon describes it, with which the law regards such gifts. The policy of the law apart, a gift by a grateful cestui que trust to his trustee is not only legitimate but laudable—why indeed is there not more of such gratitude going?—or a gift by a client to his solicitor who has seen him safely through the horrors of litigation or the worries of a ‘family’ quarrel. In nine cases out of ten no advantage is taken of the relation, no confidence abused. But honest men must suffer for the possible misdeeds of knaves, and however innocent the gift by a client to his solicitor may be the law disallows it, unless the client donor has had independent legal advice. If there is a hardship, the law confesses and avoids it by the simple but astounding paradox that everybody knows the law. Nobody does know it, not judges, nor barristers, nor solicitors, much less doctors and guardians and trustees and such like; but the theory covers a social necessity. The true reason of the rule is that if the law were relaxed, fraud in these confidential relationships would multiply most undesirably. Hence the inevitable decision of the Court of Appeal in *Liles v. Terry*, '95, 2 Ch. 679.

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*The Queen v. Farnborough*, '95, 2 Q.B. 484 (C.C.R.), affords a curious example of the mistakes of law which may occasionally be committed by a presumably competent magistrate. A

prisoner is charged with theft. The chairman of Quarter Sessions, before whom the case is being tried, finds that the jury cannot agree on their verdict. He then asks them whether they believe the evidence for the prosecution, and, on their answering in the affirmative, directs them to find a verdict of guilty, which is found accordingly. It is certainly odd that, though objection was taken to the form in which the chairman put the case before the jury, he did not see its force. It is clearly one thing to believe that the witnesses for the prosecution are telling the truth, and quite another thing to find that the evidence for the prosecution shows that the prisoner was guilty of theft. It is lucky for the prisoner in *Reg. v. Farnborough* that an experienced lawyer did not perceive that in a trial for larceny the existence of the *animus furandi* is a matter to be determined by the jury, and it is well for the public that the chairman's error was corrected by the Queen's Bench Division.

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A comparison of *Stoddart v. Sagar*, '95, 2 Q. B. 474, 64 L. J. M. C. 234, with *Barclay v. Pearson*, '93, 2 Ch. 154; *Caminada v. Hulton*, 60 L. J. M. C. 116 and *Taylor v. Smetten*, 11 Q. B. D. 207, leads to some curious conclusions.

1. The law as to public betting and lotteries is in the highest degree uncertain. A man must be able to draw a very fine line who can discriminate between the conduct of the defendant in *Barclay v. Pearson* and the conduct of the defendant in *Stoddart v. Sagar*.

2. A person may set up an institution which has all the evils of a lottery, and yet not incur any penalty under the Lottery Acts or the Betting Acts. On this point *Stoddart v. Sagar* is decisive.

3. The 'missing word competitions,' which it was supposed were checked or terminated by the decision in *Barclay v. Pearson*, may by a little ingenuity be easily revived.

4. If Parliament intends to put down public betting and lotteries the statute law on the subject must be wholly revised and amended.

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The privilege which protects confidential communications made by a client to his solicitor in view of litigation is a venerable and a very remarkable one. The doctor must disclose the confidences of the consulting room, the priest the secrets of the confessional, but solicitors, or rather their clients—for the privilege is the client's, not the solicitor's—enjoy a unique immunity: hitherto at least they have, but it is not easy to say what may be the effect of Kekewich J.'s decision in *Williams v. Quebrada Ry. Co.*, '95, 2 Ch. 751, disallowing the privilege where fraud is charged in a civil action. The reason of the rule is to secure perfect freedom between the client and his solicitor as the keeper of his legal conscience. It

is the compensation for the presumption that every man knows the law—he has full access to one who does—and as such it ought not to be frittered away. It may not protect communications made in furtherance of any criminal purpose (*Reg. v. Cox*, 14 Q. B. D. 153), or where client and solicitor have been concocting a fraud between them, are in fact co-conspirators—for concocting frauds is not in the ordinary course of a solicitor's business—but communications between a fraudulent person and his solicitor, where the solicitor is no party to the fraud, have hitherto been held privileged (*Charlton v. Coombes*, 4 Giff. 372; *Mornington v. Mornington*, 2 J. & H. 697; *Ford v. De Pontes*, 5 Jur. N. S. 993). It is easy to allege fraud, and then the privilege must be violated to see whether it exists. 'Truth,' as Knight Bruce L. J. said on this subject in *Pearse v. Pearse* (1 De G. & Sm. 25-6), 'may, like other good things, be loved unwisely.'

'The world is wide,' said Lord Justice Bowen once in a trademark case, 'and there are many names.' The world is wide, and there are many designs. There is really no excuse for imitation in a cathedral stove or anything else, and when we find such a stove selling largely, and another enterprising trader producing a similar article, only with different tracery, his conduct is only explicable on one hypothesis, and that is a desire to appropriate the benefit of another person's business (*Harper & Co. v. Wright & Co.*, '95, 2 Ch. 593, 64 L. J. Ch. 813: reversed on appeal, W. N. '95, p. 146). The argument of undesigned coincidence is one which may be commended to Judæus Apella, and the other argument—the stock argument—as to the proprietor of a design or trade mark not being entitled to monopolize art or the English language, is about equally deserving of respect. In such cases, as Lord Westbury said in *Holdsworth v. M'Crea* (L. R. 2 H. L. at p. 388), and Lord Herschell in *Hecla Foundry Co. v. Walker* (14 App. Cas. 550) repeated, the appeal is to the eye, and rightly. It is the eye by which the buyer judges, and by which, if colourable imitations are by law allowed, he will be deceived and defrauded.

There are a large number of meddlesome people in the world—busybodies—who are ready at all times to set other people to rights and do their duties for them, but with no intention of doing so gratuitously. The consequence is that the law has to lay down a strict, and what at times appears a harsh rule about vicarious acts; harsh because it frequently disappoints just moral claims. A person pays perhaps a premium on a policy to prevent it lapsing, or he keeps a child, though it has a parent, to save it from starving. He thinks—good easy man—he will get it back, but he finds him-

self to his dismay in the position of an involuntary philanthropist. The fallacy is very common with laymen, and is natural enough. It is not quite clear, however, whether the occupier plaintiff in *Thompson Manufacturing Co. v. Hawes*, 73 L. T. 369, was entitled to much sympathy. He was served with a notice addressed to the owner to abate a nuisance on the premises, and he did the work himself. It was indiscreet, at all events without knowing the morals of the owner, who proved impervious to any sentimental notions of honour. Popular lectures on law seem desirable here, but perhaps the conceit of knowledge might only involve the layman in worse troubles.

Aristotle, with his usual acuteness, remarks somewhere that there are a thousand ways of going wrong, and only one of going right. Section 25 of the Companies Act, 1867, is a good example. The possibilities of error are plentiful. You may neglect, in the first place, to register the contract for the shares 'at or before the issue of the shares.' This is serious, but not fatal so long as the company is a going concern. Or the consideration moving from the shareholder may not be the equivalent of cash, in which case you may have to pay up the balance (*In re Theatrical Trust*, '95, 1 Ch. 771, 64 L. J. Ch. 488); or, again, the so-called contract may not be signed by the parties, in which case it is not a contract to satisfy the section (*In re New Eberhardt Co.*, 43 Ch. Div. 118). *In re Common Petroleum Engine Co.*, '95, 2 Ch. 759, clears up one point which often arises in the process of reconstructing a company, namely, that if a proper contract is registered the shares may be allotted to nominees of the registered shareholder without any direct contract being entered into by the company with any nominee. This is good sense, because the real object of the registered contract is to give notice to all persons dealing with the company, whether creditors or shareholders, for what consideration—in meal or malt—the shares have been issued. It signifies nothing to them to whom the shares have been issued, but they are very much concerned to know whether a substantial or illusory consideration has been given.

English people so often insure their lives in New York or other American offices, that it becomes a matter of some importance to them to know how they stand in regard of these policies—what law, that is to say, is to govern the contract, the *lex loci contractus* or the *lex loci solutionis*. Ordinarily the contract is considered as having been made at the residence, i. e. the head office, of the company which grants it, and with reference to the law of that place (*Parker v. Royal Exchange Co.*, 8 Ct. Sess. Cas. 2nd Ser. 365): but

a different rule—the *lex loci solutionis*—was held to apply where the policy was granted by an English office through an agent in Scotland who had full power to accept and take risks without reference to the head office (*Albion v. Mills*, 3 Wils. & Shaw, 218). In *Crosland v. Wrigley*, 73 L. T. 60, Kekewich J. has come to the same conclusion—that the *lex loci solutionis* governs—in the case of a policy granted in England by a New York office with a branch in England. The Scottish authorities were not cited, nor did it appear whether the branch in England had power to accept a proposal independently of the head office; but the construction is one which will be acceptable to English policy-holders. Whether it will be equally acceptable to a New York office with a world-wide business—*tot gentes, tot leges*—may perhaps be doubted.

The decision of the Court in *Southwell v. Governors of Holloway College*, '95, 2 Q. B. 487, 64 L. J. Q. B. 791, is in conformity with good sense. There would have been something patently absurd in treating Holloway College as a charity school, and on that ground exempting it from the payment of House Duty. The case, and others like it, suggests an inquiry which must often have occurred to any one who has had any experience in Revenue cases. Is there any real advantage in maintaining the exemptions in favour of charitable institutions which are to be found in every taxing Act? These exemptions lead to a great deal of futile legislation. The benefit they confer on particular institutions is small. The amount of discontent they excite is great. Institutions which no ordinary person would call charitable are occasionally exempted from taxation. Then some institution, such as Holloway College, which is no more a charity school than it is a music hall, tries to claim an exemption to which it has no right, and its governors are aggrieved because their claim is not allowed. The plain truth is, that almost every taxing Act would be greatly improved by striking out from it almost every exemption; the law would be thereby simplified, and no man would really lose anything substantial except the barristers who have devoted themselves to mastering the intricacies of Revenue law.

It may or may not be politic for Parliament to enact that contracts made by a local authority must be made in a particular manner; but it is clearly both right and wise that the Courts should give full effect to parliamentary enactments. From this point of view it is satisfactory that in the *British &c. Co. v. Prescot Urban District Council*, '95, 2 Q. B. 463, the Queen's Bench Division has held that the provisions of the Public Health Act, 1875, sec. 174, sub-sec. 2, are obligatory and not only directory, and therefore

that a contract within the section which does not fulfil its terms is void.

In *The National Bank of Scotland v. Dickie's Trustee*, June 20, 1895, 22 Ct. Sess. Cas. 4th Ser. (Rettie) 740, the facts are not unlike those in *Lord Sheffield's* case (13 App. Cas. 333), and the Scots court arrived at a result adverse to the bank's claim, although on a somewhat different ground from that taken in *Lord Sheffield's* case. In the Scots case a gentleman had asked Mr. Dickie, who was his stockbroker, to obtain a loan for him of £7,200, and to enable Dickie to negotiate the loan, he handed to him railway stock of considerably more value than the loan desired, in order that it might be pledged with the bank. The money was obtained from the bank by Dickie, and a transfer of the stock in the name of a nominee of the bank was lodged with the bank as security. Dickie kept his banking account with the National Bank of Scotland, and, on his bankruptcy, a balance remained due to the bank, after the bank had sold the railway stock belonging to Dickie's client and repaid itself the advance of £7,200. The stock realized considerably more than £7,200, and the bank claimed to retain this balance against Dickie's debt to it. It was proved by the admissions of the bank's officials that when stock-brokers applied for loans on similar securities the bank assumed that they were acting for clients. The bank officials also stated that they did not regard the borrowers—whose name indeed they did not know—as their customers: they looked to the broker. It was admitted that Dickie never had authority to pledge the stock for any other advance than the £7,200. The court took the view that if Dickie had borrowed a larger sum than he was empowered to borrow, the owner of the stock would undoubtedly have been bound by his acts to the extent of the sums advanced on an express contract of loan; but that in point of fact the bank, in giving Dickie an overdraft, did so upon his own credit, and not upon the security of the stock in question. It will be seen that the court did not go upon the ground that the bank, because it had reason to believe that Dickie's authority was limited, and did not inquire into the extent of his authority, had thereby become personally barred, but upon the ground that the stock in question had never been made the subject of any contract except the one under which the original advance was made. The bank in such a case is entitled to plead against the principal the contract which his broker may have made with respect to the stock. The owner therefore cannot redeem his property, except on payment of the advances for which it was pledged. But, on the other hand, the bank cannot retain it for the separate debts of the agent.

A learned American correspondent writes as follows:—‘On the evening of November 27, 1895, being the eve of general Thanksgiving Day in the United States, the Massachusetts Society of Colonial Wars commemorated the 600th anniversary—November 27, 1295—of the opening of the first generally representative Parliament of England. Among those who took part in promoting the commemoration, who are known in England, were Dr. Melville M. Bigelow, Chairman, and Professors James B. Thayer and Charles Gross, members of the Committee of Arrangements. The exercises took place in the historic Old South Meeting-House, and were attended by a large company of people from Boston and vicinity.

‘A short introductory address was delivered by Mr. Bigelow, followed by another short address by the Governor of the Society, who then introduced the speaker of the evening, Abner Cheney Goodell, A.M. Mr. Goodell spoke on the history of popular government in England and in Massachusetts. His address was highly appreciated.’

We annex a copy of the notice convening the meeting, and hope that the fact will speak for itself to any of our readers who may be disposed to attach undue importance to the anti-British vapourings of a few professional politicians.

1295-1895.

## SOCIETY OF COLONIAL WARS

IN THE

### COMMONWEALTH OF MASSACHUSETTS.

The Six Hundredth Anniversary of the first representative English Parliament will be commemorated by the Society, at the Old South Church, Boston, on the evening of November 27, 1895.

Abner Cheney Goodell, Jun., A.M., will deliver an address on the Early English Parliament and the Early Representative Assemblies of the Massachusetts Colony and Province.

MELVILLE M. BIGELOW, *Chairman.*

Members of Patriotic Societies are requested to wear insignia. Additional cards of admission can be obtained by post, of the Secretary, at 20, Fremont Street.

We have received the first number of the *American Historical Review* (Macmillan & Co., New York and London), which gives excellent promise.

*It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.*

## THE GERMAN CIVIL CODE\*.

## I.

[The notes to which reference is made are collected at the end of the article.]

THE draft of a Civil Code which will shortly be laid before the German Reichstag is a work of more than local or national interest. Whatever may be its fate—be it that the puerile petulance of pompous pedants or the fatal folly of factious fanatics succeed in their work of obstruction, or be it that the strong wave of national feeling and healthy common sense, which has hitherto kept the enterprise afloat, will also carry it into a safe harbour—the draft code itself and the history of its construction will be and remain a *κρήμα εἰς αἰεὶ* to the lawyers of all nations. To prove the justice of this assertion will be my endeavour on this occasion, but the value of the work and the special difficulties under which it was accomplished cannot be properly explained without a short historical retrospect<sup>1</sup> and a rapid sketch of the system of law, or, to speak more correctly, the numerous systems of law which at the present moment are in force throughout Germany.

Those of us who have climbed the wooded hills of Thuringia or the Palatinate, or who have wandered through the vineyards on the borders of the Rhine or the Neckar, have seen and admired numerous castles, partly in ruins and partly preserved almost in their pristine splendour. The absence of these castles in most of the counties of England and their presence in Germany are ocular demonstrations of the contrast of the development of the two countries. We are told that in Stephen's reign there were as many kings as there were castles, who struck their own coin and exercised sovereign jurisdiction<sup>2</sup>. This is the state of things which was perpetuated in Germany, and it is a strange fact that whilst the strong hand of Henry II (who destroyed the castles 'down to the soil'), by his organization of a new judicial system, established an English common law on a firm basis, his contemporary, Frederick Barbarossa, took a step which for a long time destroyed all chances of the establishment of a common German law. By destroying the dukedoms he allowed the smaller vassals to enter into direct feudal relations with him; and the imperial counts, who formerly had exercised jurisdiction in the name of the emperor, but who had subsequently received grants of their jurisdiction by feudal tenure, now assumed powers which gradually turned them into almost independent sovereigns.

\* A paper read at a meeting at the Inner Temple convened by the Society of Comparative Legislation.



A German law had never existed ; the six nations which were united under the Frankish empire had laws of their own, which had partly been reduced into writing and become known as *leges barbarorum* <sup>3</sup>. Some imperial statutes were passed by Charlemagne, and as, owing to the gradual disappearance of all learning among the classes who had judicial powers <sup>4</sup>, the old written books had become obsolete and useless, the successors of Charlemagne might easily have created a German law, more especially since the separation of the German kingdom from the rest of the Frankish monarchy (888) ; but they were not strong enough to do so. The law became disintegrated owing to the multiplicity of jurisdictions produced by the numerous grants of liberties and franchises, and by the withdrawal of towns from the royal counts' jurisdiction. But besides these territorial divisions there were also multifarious immunities and separate jurisdictions dependent on personal status, and thus by the side of the territorial law and the town law there was the manorial law and the ministerial law, which were all administered separately.

The destruction of the dukedoms, as I have mentioned before, turned the small vassals and counts into sovereigns ; the king's justice was administered in the royal court only, and only for limited purposes and in an ineffective manner <sup>5</sup>.

The movement of disintegration was arrested in the thirteenth century by two principal factors : the spread of general education, and the growth of the towns. Reading and writing now ceased to be the distinguishing accomplishments of the clergy, and written records of the proceedings of the courts began to be kept in consequence. The example was set by the imperial court, for which the keeping of records relating to important decisions was ordered in 1235. The express reference to local law in the decree in question <sup>6</sup> shows that there existed no idea of a common imperial law at that time. The precedent was followed by many of the city courts, and more especially in those cities to which other towns stood in dependent relation. Several such collections of cases, which are known by the name of *Weistümer*, have been preserved, as well as general statements of city laws, for the use of subordinate towns <sup>7</sup>. But the great event of the thirteenth century was the publication of the *Sachsenspiegel* <sup>8</sup>, a book on the Saxon law divided into two parts, one dealing with the feudal, the other with the general territorial law. It is impossible to overstate the influence of this book ; it must not be forgotten that Saxon law as one uniform system had long ceased to exist ; for although the numerous laws administered in the Saxon territories had certain marked characteristics in common, they also contained many variations. Now the

Saxon law became again a recognized common system; but in addition to this unification of Saxon law, a general unification of German law might at that time have been easily accomplished. The law, it must be remembered, was administered by laymen who followed certain traditions, but who attributed no special infallibility to these traditions. A book of authority was therefore followed without much question as to its agreement with the law actually practised, and the law-book writers, who now imitated the *Sachsenspiegel*, did not pause to consider whether the law which they stated was absolutely correct according to local traditions. Among the books which were thus brought out, one called the 'Mirror of the Germans,' and one called the 'Mirror of the Suabians,' are the best known; to a great extent they are copies of the 'Mirror of the Saxons.' But a movement was already proceeding which arrested these attempts at unification on German lines. The Universities of Italy attracted many young men from Germany, where they were taught that there was only one law, and that the Roman law. Moreover it must not be forgotten that the German kings were emperors of the holy Roman Empire, and on that assumption they considered the Roman law as the law of the empire, subject to the recognition of local customs. Already in 1342, the imperial court was ordered henceforth to decide according to the statutes and the written law of the predecessors of the king and emperor in the Roman Empire<sup>9</sup>; but this order remained without effect.

The final establishment of Roman and canon law as the common law of Germany is reckoned from the date of the constitution of the imperial chamber court (1495), which was to be composed of judges of whom at least one-half were to be learned lawyers—that is to say, lawyers trained in Roman law—and which was to adjudge 'according to the laws of the empire and the common law,' but with due regard to the customs and statutes of the territories. Thus the so-called 'reception of foreign law' into Germany was effected. The law of the empire and common law was deemed to consist (a) of Roman law as stated in Justinian's compilation, in so far as it had been recognized by the glossators, (b) of the canon law as laid down in the *corpus juris canonici* in its final form, and (c) the law of the Lombard *libri feudorum*. Local customs or rules of law, in so far as they were clearly established, were not intended to be interfered with; this is meant by the expression that the foreign law was received as subsidiary law, but the effect of this rule was not equal in all places. When the local law was firmly rooted and administered over a large region, like the region of the *Sachsenspiegel*, it withstood the influence of Roman law much better than

in places where its rules were of a vaguer kind and covered a smaller area only. In such places the fact that professional lawyers were now also appointed as judges of the local courts<sup>10</sup> strongly worked in favour of Roman law.

Some writers represent the introduction of Roman law into Germany as an arbitrary act of the sovereigns, but it cannot be doubted that it was only one among the several effects of the great revival of classical learning which at the time took possession of the minds of the educated classes throughout Europe. In its political aspect the renaissance movement furthered the cause of enlightened despotism, and as such it was obnoxious to the masses, to whom the new art and the new learning meant nothing and gave nothing. These facts, together with the shaking of the beliefs in recognized authorities effected by the Reformation, were among the influences which caused the Peasants' Wars of the sixteenth century, in the course of which the administration of foreign law by professional judges was represented as one of the grievances. On the other hand, the lawyers admitted that things were not working smoothly, but ascribed the cause to the confusion created by the mixture of laws. The Emperor Maximilian seems to have contemplated a general German Code in order to remove these difficulties, but his scheme was not carried out<sup>11</sup>. Charles V was the first emperor who introduced a code embracing one part of the law applicable to the whole of Germany, viz. the Criminal Code, known as *Constitutio Criminalis Carolina* (1532). He was a powerful sovereign, and might have become a true king of Germany; but in the same way as Frederick Barbarossa missed the chance in Germany, which was taken by Henry II in England, Charles shrank from the policy which proved so successful for Henry VIII. If Charles had taken the side of the Reformation<sup>12</sup>, the unification of German law might have been accomplished more than three hundred years ago. His adherence to Rome caused the disruption of the empire and the Thirty Years' War, at the end of which (1648) the territorial sovereigns acquired powers which made them practically independent of the king. Legislation had already before that time become fairly active in the territories, but it was fragmentary and incomplete in manner, and its sole object was to supplement or explain the existing law. The last general statute belonging to that stage of legislation is the *Codex Maximilianus Bavaricus Civilis* (1756).

The second half of the eighteenth century is a period of unusual interest in every respect; it matured the intellectual movement which culminated in the French Revolution and the final overthrow of the political ideas of the renaissance, and which in the domain

of metaphysical and scientific inquiry removed the fetters and obstacles of mediaeval prejudices. It was quite in accordance with the spirit and tendencies of this movement to adopt and perfect the theory of natural law which Grotius, Pufendorf, and others had begun to expound in the seventeenth century<sup>13</sup>; and it was under the influence of that theory that Frederick the Great instructed his chancellor, Cocceji, to prepare a code on a rational basis, in accordance with which the first part of a draft code appeared in 1749 under the title of 'Draft of the Corpus Juris Fredericiani'<sup>14</sup>. The influence of natural law is traceable in general expressions and the outward form of this draft, but in its practical rules it is merely a reproduction of Roman law, and it is also full of technical Latin words. This circumstance, and the further fact that it was to supersede all local customs, made it very unpopular, and Cocceji's death (1755) as well as the outbreak of the Seven Years' War (1756) prevented its completion. But the great king did not abandon his intention, and in 1780 he instructed Carmer to prepare a new scheme of codification. Carmer, in his turn, entrusted the principal part of the work to his assistant, Suarez<sup>15</sup>, and their labours resulted in the production of the code which, under the title of 'Allgemeines Landrecht für die Preussischen Staaten,' came into force on June 1, 1794<sup>16</sup>, and which, subject to certain exceptions and modifications, is still in force in a large part of the kingdom of Prussia and also in some districts belonging to other States. The Landrecht was not to interfere with local customs, which were to form the subject of separate codifications, but only two codes embodying local customs (dealing respectively with the eastern and western part of the *province* of Prussia [which is situate at the north-eastern frontier of the Prussian kingdom]) were completed. The parts dealing with the law of inheritance and the effect of marriage on property were at first suspended, and the previously existing law on these subjects continued, but the suspension was gradually withdrawn everywhere, except in the Mark Brandenburg (which includes Berlin) and the former Duchy of Westphalia. In the former locality the old law (*Constitutio Joachimica* of 1527) still governs the matters in question, whilst in the latter region they are now regulated by a special statute (1860)<sup>17</sup>.

The Prussian Landrecht is the first code in the modern sense and the only one which, so far, has survived its hundredth anniversary. It is divided into an introduction and two principal parts. The introduction deals with the general effects of the code and contains a number of legal maxims, which are interesting as showing the effects of the new doctrines. The first part contains the provisions

relating to the rights and duties of individuals as such. The second part deals with the rights and duties attaching to individuals by virtue of their family relations or of their social or economical status (which rights and duties comprise some which are now generally excluded from text-books or codes dealing with private law only), and also contains a chapter on criminal law<sup>18</sup>. This arrangement and also the arrangement of the subdivisions would hardly be called scientific in our days, but it gives evidence of an intelligent purpose. The language of the *Landrecht* is very remarkable; it has no trace of the pedantry and show of learning which then in many quarters was still thought indispensable, and uses simple and popular modes of expression. Many of the legislative ideas embodied in the book were bold and advanced, and but for the approval of that great and far-seeing king who inspired the work (though he did not live to see its completion) would never have been ventured upon at the time.

The chief fault of the code was tersely pointed out by Frederick in a marginal note to the last instalment of the second part submitted to him in 1781, which reads as follows: 'It is a very fat book, and statutes must be short and not lengthy<sup>19</sup>.' The legislators' intention was that all contingencies should be provided for with such careful minuteness that no possible doubt could arise at any future time. The judges were not to have any discretion as regards interpretation, but were to consult a royal commission as to any doubtful points, and to be absolutely bound by their answer<sup>20</sup>. This stereotyping of the law was in accordance with the doctrines of the law of nature, according to which a perfect system might be imagined, for which no changes would ever become necessary, and which could therefore be laid down once for all, so as to be available for any possible combination of circumstances. It need not be mentioned that in the course of time this proved a mistake; the commission was dissolved, the right and duty of the judges to interpret the law so as to give effect to changes in the general condition of things came to be recognized. Many of the provisions of the code became obsolete, others were expressly repealed by subsequent legislation, but the main principles remain, and many of them have received full recognition by the authors of the new draft code.

The next great code which was introduced into a part of Germany was Napoleon's Code Civil. It was planned in 1800, but only the fourth draft was adopted, and Napoleon's personal intervention was necessary to secure its acceptance and publication in 1804<sup>21</sup>. The arrangement of the Code Civil proceeds on the threefold principle of subdivision familiar to the lawyers of the

period—according to which there was a law of persons, a law of things, and a law of acts; only the law of persons is called ‘the law of the enjoyment and deprivation of civil rights,’ the law of things is called ‘the law of things and the various modifications of property,’ and the law of acts is called ‘the law as to the modes of acquiring property.’ The book dealing with the last named matter also refers to those modes of acquiring property which arise through family relations, and are in the Prussian Code included in the law of persons, and further contains the rules as to obligations arising from contracts or torts, which cannot logically be described as modes of acquiring property in any sense. But there are two features characterizing the Code Civil which give it a great advantage over the *Landrecht*: the first consists in the short summarizing statements which precede the principal heads, the second in the avoidance of casuistical fetters. For the first time in the history of legislation broad principles are laid down, the application of which is left to those whose duty it is to administer the law. The well-known Art. 1382: ‘*Tout fait de l’homme qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer,*’ is a good instance. The language of the Code Civil is remarkable for its conciseness and lucidity, and a large number of sections can be read through continuously without an effort and without any feeling of tedium. A further point, in respect of which the code represents an advance, is the repeal of all local laws and customs (enacted by Art. 7 of the law of 30 Ventôse an XII), by which means for the first time the possibility of ascertaining the law from one book was secured.

The Code Civil in its original form was introduced in the regions now known as the Prussian Rhine Province, the Rhenish part of the Grand Duchy of Hesse and the Bavarian Palatinate. In the whole of the present Grand Duchy of Baden the ‘*Baden Landrecht*,’ which is a slightly modified translation of the Code Civil, was promulgated in 1809<sup>22</sup>.

The Austrian Code which was passed in 1811<sup>23</sup> is more logical in its systematic arrangement than either of its two predecessors. Like the French Code, it is divided into three parts, respectively called ‘the law of persons,’ ‘the law of things,’ and ‘provisions common to the law of persons and things;’ but the provisions on the subjects dealt with in the third book of the French Code are here included in the second, which is subdivided under two main heads, viz. rights ‘in rem’ and rights ‘in personam.’ The first book, unlike the French Code, excludes all rules belonging to the domain of public law. The Austrian Code, being mainly an embodiment of Roman law, has some indirect influence on the German law<sup>24</sup> of

the present day (Austria being since 1866 separated from Germany), and it is still the law of some parts of Bavaria.

The old empire was broken up in 1806, and after Napoleon's final defeat the Congress of Vienna caused the German confederation to be formed; many of the smaller territories were then absorbed by the neighbouring States, but the diversities in the law still continued. The idea of a German Code was however discussed at that time already, the proposal for such a code having been made by Thibaut, a distinguished professor of Roman law; but Savigny in his well-known pamphlet on the fitness of our generation for legislation and jurisprudence opposed the project, on account of the insufficient development of legal science, and also on the ground that the German language was not sufficiently formed for the purpose: apart from these temporary reasons he objected to codification generally; he relied on the slow evolution of legal doctrine by historical forces as opposed to direct legislation on *a priori* principles. He was one of the leaders of that historical school which destroyed the doctrines of natural law. The merits of this school cannot be denied by any one in our days, but the doctrine of natural law is not the only basis of codification. It is a strange irony of fate that, some twenty years after the publication of his pamphlet, Savigny undertook the task of bringing out a revised edition of the Prussian Code (thereby admitting that the time was then ripe for legislation), but that he failed to bring the task to a satisfactory conclusion<sup>25</sup>. The period from 1815 to 1848 was barren in the field of legislation, but the national feeling which the wars of Napoleon had aroused in Germany, though discouraged by the political rulers, was fostered by the intellectual leaders, and was slowly gathering strength and power. It was one of the forces that brought about the revolutionary movement of 1848, and from that time it became clear to the German sovereigns that it could not be disregarded. The immediate result was a new activity in the field of national legislation. The first code which was adopted as the law of all the German States (like the first code enacted for England, Scotland, and Ireland) dealt with the law of bills of exchange. It was discussed by representatives of all the States, and promulgated as a law of the short-lived empire of that period, and either confirmed or introduced as a separate State law in most of the States between 1848 and 1850. The last State which adopted it was the Electorate of Hesse, which waited till 1859. The German Mercantile Code was in a similar way passed as a State law by most of the individual States, including Austria, between 1862 and 1866.

Mercantile law was a body of law standing apart from the general law as a separate aggregate of rules applicable to merchants and

mercantile contracts, without regard to the nationality of the parties or the place of the transaction. It had come to be recognized as such already in the thirteenth century. The leagues formed by the merchant guilds of numerous Italian towns, the Hanse Leagues of the North, and the great French fairs had contributed to the formation of this *Lex Mercatoria*. In England the law merchant was received into the common law; in Germany it remained separate from the general law, being the only body of law common to all Germans, but as the common mercantile law of Germany it became imbued with certain national characteristics. This common German Mercantile Law was broken into by the Prussian Code which dealt with mercantile law, and by the legislation of countries adopting French law who used the French Commercial Code as well as the Civil Code. The new German Mercantile Code re-established a common German Mercantile Law in respect of the matters to which it referred. Where the code is silent, mercantile customs are to be applied, and where there are no mercantile customs, the local law governs the question<sup>26</sup>. The local law is also frequently referred to in the individual provisions of the code: for instance, the code contains certain rules relating to the passing of property in goods, purchased or taken by way of pledge, without notice of any defect in the vendor's title; these are followed by a proviso, according to which the general local law is not to be superseded, in so far as it is more favourable to the purchaser; thus the Mercantile Code does not by any means contain the whole of what in this country would be called mercantile law. It is also frequently a matter of some difficulty to ascertain whether the law of the code or the general law is to be applied. The practical consequences of this difficulty are sometimes very serious. Thus a question may arise as to the validity of a contract; some of the local laws, as, for instance, the Prussian Code, require certain contracts to be in writing, whilst mercantile contracts as a general rule are free from any restriction as to form. In such cases very frequently the only issue between the parties is the question whether the code is to be applied or not.

At the same time as the passing of the Mercantile Code one of the German States, the kingdom of Saxony, codified its own law. This code is an interesting piece of work as embodying more modern principles, but it is hardly worth while to dwell upon it now.

In 1871 the Bill of Exchange Code and the Mercantile Code were re-enacted as imperial laws. A criminal code which in 1870 had been passed for the North German confederation also became the law of the empire. Codes of Civil and Criminal Procedure, a code organizing the courts throughout Germany on a uniform system



and establishing a Supreme Court of Appeal at Leipzig, and the Bankruptcy Code, came into force in 1879. A great many other subjects were regulated by further imperial legislation, the most important being those dealt with by the Marriage and Registration Law, the Law of Copyright and Trade Marks, the Patent Law, the laws as to compulsory insurance and various other matters. But as to the matters not regulated by the codes or statutes passed by the imperial authorities, the local law is still applicable. Speaking broadly, it may be stated that out of a population of forty-two and a half millions, eighteen millions are governed by the Prussian Code, fourteen millions by the German common law, which remains the modernized law of Justinian, seven and a half millions by French law, two and a half millions by Saxon law, and half a million by Scandinavian law. There are therefore six general systems of law, but only two out of these, the system of the French and that of the Saxon Code, are exclusive systems; the other systems are broken into by the manifold local laws and customs which have been referred to in my historical sketch. These local rules relate more especially to the laws of inheritance and the law relating to the effect of marriage on property. The number of variations and subdivisions is sometimes almost comical. It may happen that a boundary line runs through a house, or that even two boundary lines divide one building into three parts, and a story is told of a town in Bavaria in which the several estates of three persons respectively dying in different rooms of one house may have to be administered according to three separate systems; moreover the line of separation is not always geographical only, it also separates the various strata of the social edifice; thus in the towns of Mecklenburg-Strelitz the effect of marriage on property is different in the case of a shop-keeper and in the case of a government official. In several German States the nobility are under a law of their own. In the city of Brunswick the wives of traders being creditors to their husbands are postponed to creditors, whilst the wives of other persons have a privileged claim for their dowry. In addition to this, the geographical divisions separating the systems of law as a general rule do not coincide with the political divisions, and even the State legislation is sometimes affected by this anomaly; thus the Prussian Code is in force in some parts of Bavaria, but it is not in force in four out of the eleven provinces of Prussia, and within the provinces there are frequent exceptions to the general rule. Again, some of the special legislation refers to the whole of a State, whilst other legislation refers to parts only; thus the Prussian law as to guardianship governs the whole of the Prussian monarchy, on the other hand the legislation referring to land registers differs for

the several provinces. The result is that in every case which arises in Germany, the following questions must be asked: Is there any imperial statute? Is there any local modern statute? Is the subject affected by older legislation? What local law governs it? The confusion which arises from this state of things may easily be imagined, and it will not surprise anybody that the unification of German law was one of the things which was most eagerly asked for on the formation of the German empire. Attempts at codification of the whole of the general law had been made at various times during the century. An elaborate draft code had been prepared for Bavaria in 1858, and fragments of the same were published in 1860 and 1864. The arrangement of that draft and the division of the subject into five parts is the one adopted by the authors of the first draft German Code, which is the principal subject of this paper. Another draft was prepared for the Grand Duchy of Hesse between 1841 and 1853; the code for the kingdom of Saxony of 1862, which represents the only one of these attempts that was carried to a successful issue, has already been mentioned by me. As regards the whole of Germany, the codification of the law of obligations had been decided on by the Assembly of Delegates representing the German confederation in 1862. The preface to the draft, prepared by a commission in accordance with this resolution and known as the Dresden draft, was dated June 13, 1866; but on June 14 of that year the confederation was dissolved, and the draft was then thought to be a piece of waste paper. By a strange combination of facts the same draft now forms the basis of the law of obligations in the new code.

There were therefore the two old codes, the Prussian Code and the French Code, one new code, viz. the Saxon Code, and several carefully considered drafts which could be used as a guidance by the persons entrusted with the new work<sup>27</sup>. But there was something more than that, the common law of Germany, which, as I have explained, is a modernized system of Roman law; this is not only administered as the law of one-third of the German population, but it is also the basis of all the codes, and it is the main subject of legal education throughout Germany. It is not taught in divisions or branches only, but as an organized system, each part being considered not only in itself, but also in its relations to the other part and to the whole. This conception of the system of private law as a whole, and the perfection of the classifications and definitions brought about by the successive work of generations of eminent men, is a preparation for the work of codification which cannot be overvalued. It is, in my opinion, a condition precedent to the success of any codification on a large scale.

On July 2, 1874, a commission was appointed for the purpose of preparing a draft Civil Code for the German empire<sup>28</sup>. The commission consisted of eleven members, out of whom six were judges, three were officials in the ministries of justice of their respective States, and two were University professors. Dr. Pape, the President of the Supreme Court of Leipzig (the jurisdiction of which was then confined to mercantile matters), acted as chairman. As regards the first task of the commission, consisting in the elimination of matter to be excluded from the code, their hands were not entirely free, as a preliminary commission, appointed by the imperial parliament, had already discussed the subject, and although their recommendations were not to be binding on the commission, yet it would not have been wise to disregard them in respect of any matter of principle. Thus it had been resolved that the mercantile law and the law of bills of exchange should remain separate from the general law as heretofore, that the law relating to mines should be reserved for separate legislation, that certain mediæval survivals, such as the law of feudal estates and inalienable realty, should be disregarded, and also that part of the law which was of a quasi-public nature, such as the law as to sporting rights, as to enclosures, expropriation, &c., should not be regulated by imperial legislation without any further consideration. These recommendations were, in the main, adopted by the commission; and it was also decided that those parts of the mercantile law which were not included in the Mercantile Code, such as several statutes dealing with points of maritime law, the law of co-operative societies, the law of insurance, the publishing law, the law as to copyright, patents, and similar matters, were to be left outside the scope of the code. The work was divided into five parts, which were apportioned among five members of the commission, who were respectively to prepare drafts relating to the parts entrusted to them. Each of these five draftsmen was provided with an experienced assistant taken from outside the commission. The business of the draftsmen was to collect materials as to the existing law, to consider how far they could be used, and each, besides drafting his part, was to furnish a summarized statement of the materials and of his manner of dealing with the same. The draftsmen were to hold regular meetings, in which they were to discuss the form and language of the code as well as such matters of principle which were relevant to the whole, or at least to several parts, and also all questions as to the systematic arrangements and the determination of conflicts of jurisdiction between the several parts. The commission was to meet when required for the purpose of determining all points involving important matters of principle, and

also such conflicts of jurisdiction as the draftsmen could not agree upon.

Four out of the five parts were completed in this manner in the course of seven years; the parts dealing with the law of obligations were at first delayed owing to the illness of the draftsman, and on his subsequent death were abandoned altogether, the Dresden draft of 1866, which I have already mentioned, having been substituted as a basis of discussion. During the years from 1874 to 1880, the draftsmen held weekly meetings for the purposes I have mentioned, and the commission had altogether seventy-eight meetings. From December, 1880, to October, 1881, the meetings were interrupted so as to give all members time to study the proposed drafts. At the last-mentioned date the second stage of the work began, during which the draft was gone through section by section, and an elaborate procedure was adopted for the purpose of securing the proper drafting of the amendments; the whole draft as amended was then again submitted to the commission for discussion, and finally settled at the end of 1887. Thus the work of the commission had taken thirteen years, out of which seven were used for the first drafting and six for the revision. But the labours of the commission were not at an end, as they had still to prepare a separate bill containing the transitory provisions and some other collateral subjects which, according to German practice, are generally embodied in a separate statute called the Introductory Statute. The next step decided on by the Federal Council was the publication of the first draft and of the 'motives;' that is to say, of the summarized materials accompanied by statements as to the reasons which induced the commission in each case to take the line which was finally decided upon. These motives always deal with each group of sections generally, and then separately with each section. Quite apart from the interest they offer, being, as it were, a guide to the legislative intentions of the commission, they also form a most valuable work of reference, in which the local law on any subject may be found stated concisely and accurately. The object of the publication of the draft and of the motives was to elicit criticism. This is expressly stated in the introduction, in which business men as well as lawyers are invited to express their opinions, and in which the imperial department of law and justice declares its willingness to receive and entertain all communications relating to the subject.

I need hardly say that this invitation was responded to in the amplest manner. The floods of pamphlets, magazine articles, speeches, debates, newspaper leaders and paragraphs, and literary productions of all sorts and sizes, which deluged Germany soon

after the publication of the draft, cannot be adequately described. Most of the criticism was fair, and some of it was sensible and useful. The imperial department took the trouble to digest this criticism, and to analyze and summarize it generally as well as under each section. This analysis was printed but not published. The department however, as I know from my own experience<sup>29</sup>, willingly gave copies to lawyers about whose legitimate interest in the subject they were satisfied, and they similarly printed and distributed a volume of criticism issued in the Prussian Ministry of Justice. As far as I have ascertained, only one of the critics, Mr. Bähr, a member of the imperial court at Leipzig, a very eminent but somewhat crotchety jurist, objected to the code on the ground of his general disapproval of codification. Several distinguished men were of opinion that the draft was so hopelessly bad that it could not be mended; others agreed as to the defective quality, but thought that the unity of law was so valuable to Germany that a bad code was better than no code. The great majority among practical as well as theoretical lawyers recommended a certain number of alterations, but approved of the draft as a whole. On December 15, 1890, another commission was appointed for the purpose of preparing a second draft on the basis of the first, but with due regard to the expressions of opinion, to which I have referred. This second commission, like the first, consisted of eleven members, out of whom eight were government officials, two were University professors, and one was a practising lawyer. Only two members were retained from the first commission<sup>30</sup>. In addition to these regular members a number of temporary members were appointed for specified purposes, among whom there were several laymen. As in the last commission, one draftsman was appointed for each part, but one member<sup>31</sup> was appointed as general draftsman. The second draft was completed and published during the current year, and it is generally thought that it will be submitted to the Reichstag during the now approaching session. A prolonged discussion is not expected. Either the draft will be accepted as it stands or with a few minor amendments, or it will be rejected. In the latter event several decades will probably elapse before another Sisyphus will roll the heavy stone up the steep hill. The general Congress of German lawyers which met in the course of the year 1895 has, by a large majority, expressed a strong hope that the present draft will be accepted. The most important Chambers of Commerce are successively passing similar resolutions; among practical lawyers and business men the opinion in favour of the code is almost unanimous. The irreconcilables may be divided into two classes; the members

of the first class (whom in my introductory remarks I have called the pompous pedants) say the code is not German, and that it represents only a slightly Germanized system of Roman law. It is vain to tell them that the influence of Germanic law has been very marked throughout all the parts of the code; that, in their opinion, is not sufficient. They say that Roman law is constructed on a principle differing altogether from the principle of German law, and that the German law ought to abandon that principle. They do not heed, or perhaps they regret, that the thought of the educated classes in Germany has now for four centuries been under the influence of classical culture, of which the Roman law is by no means the worst product; that the Roman law itself is, by a large number of persons, looked upon with familiarity and fondness; that there never was any common Germanic law, and that neither they nor their Germanistic predecessors have succeeded in reducing the Germanic law into a scientific system. What these learned men would like is a return to the time when status was everything and contract was nothing. But they know quite well, or at least they ought to know, that whether the code be accepted or not, the great elemental forces which determine the economical life of nations are not diverted from their course by the affected and artificial aspirations of a retrogressive romanticism.

If they were alone, they would hardly be a danger to the prospects of the code; but the factious fanatics, whom I have mentioned as a second class of opponents, use the support of men of learning and distinction, about whose good faith and honourable feeling there can be no doubt, for their own sinister purposes. These violent politicians object to the code on various grounds. There is one section who takes up the German cry. They are the people who wish to re-introduce race-distinctions into modern life, and who affect to look upon the code as made in the interest of those whom they wish to treat as intruders. Their argument is rhetoric and most of their facts are fiction, but unfortunately they are not a *quantité négligeable* in German public life. The Ultramontanes stand on more solid ground; to them obligatory civil marriage and the possibility of divorce *a vinculo* are abominations, and some of them will not sanction any code which affirms these institutions. The fact that civil marriage is now compulsory throughout the empire, that divorce is in most parts of Germany allowed by the existing law, and that there is no prospect of any change in that respect, whether the code be passed or not, has no influence on these politicians, and it is only a question whether they be numerous enough to outvote the supporters of the code.

Another section oppose the code on the ground that it is not sufficiently socialistic in its tendencies, and that in manifold ways it withholds the protection to which the weak are entitled in their struggle with the strong. In answer to these opponents it can be proved that in several respects the draft code goes further in the direction of socialism than any previous legislation, and also that whatever views may be held as to the ultimate prospects of socialistic doctrine, it is quite clear that at the present day a large majority among the educated portions of the German nation is opposed to them, and that a code which would disregard the view of that majority would have absolutely no chance of being accepted.

The same may be said of the opposition which proceeds on the ground that married women ought to have been treated in a manner more in accordance with modern ideas. It is quite true that married women in England are at the present moment in a much more satisfactory position than their German sisters are, or will be after the introduction of the code, but an attempt to imitate English legislation in that respect would have met with irreconcilable opposition. The general opinion, as I have mentioned before, is that all practical and substantial objections to the contents and arrangement of the first drafts have been recognized and removed by the authors of the second. It has in fact been said by competent men that the second draft is not the work either of the first or of the second commission, but of all lawyers in Germany.

In a subsequent paper I shall deal with the arrangement and contents of the code.

E. SCHUSTER.

#### NOTES.

1. On the history of Germanic law, see Brunner, *Deutsche Rechtsgeschichte* (of which only two volumes, embracing the time down to the end of the Frankish dynasty, have as yet been published); Siegel, *Deutsche Rechtsgeschichte*; Stobbe, *Geschichte der deutschen Rechtsquellen*; and see also Stobbe, *Deutsches Privatrecht*; Roth, *Deutsches Privatrecht*; and Heusler, *Institutionen des deutschen Privatrechts*. On the history of Roman law down to the end of the fifteenth century, see Savigny, *Geschichte des römischen Rechts im Mittelalter*. There is no general work as to the later development, but most of the works on 'Pandekten' contain short statements. See also Dr. Grueber's introductory essay to Sohm's *Institutes of Roman Law*, translated by J. C. Ledlie (noticed L. Q. R. viii. 257).

2. See the passage from William of Newburgh, quoted by the Bishop of Oxford, *Const. Hist.* i. 328.

3. These are in chronological order: *lex Salica* (486); *lex Ribuariorum*; *lex Alamannorum*; *lex Bajuvariorum*; *lex Frisionum*; *lex Saxonum*; *lex Anglorum et Werinorum hoc est Thuringorum*.

4. Henry III's Chancellor Wipo in his *Tetralogus*, published 1041 (*Monumenta Germ. Sc.* xi. 217), pleads for a reform of legal education in the following words (quoted by Siegel, l. c., p. 42):—

Tunc fac edictum per terram Teutonicorum  
 Quilibet ut dives sibi natos instruat omnes  
 Litterulis, legemque suam persuadeat illis,  
 Ut cum principibus placitandi venerit usus  
 Quisque suis libris exemplum proferat illis,  
 Moribus his dudum vivebat Roma decenter,  
 His studiis potuit tantos vincere [*sic*!] tyrannos;  
 Hos servant Itali post prima crepundia cuncti  
 Et sudare [!] scholis mandatur tota iuventus.  
*Solis Teutonicis vacuum vel turpe videtur*  
*Ut doceant aliquem, nisi clericus accipiat.*  
*Sed, rex docte, iube cunctos per regna doceri*  
*Ut tecum regnet sapientia partibus istis.*

5. The decay of the kingly power was felt keenly by intelligent men. See, for instance, Walter von der Vogelweide's poem, written in 1198, beginning with the lines 'Ich hörte ein wazzer diezen,' in which the following passage occurs:—

Owê dir, tiuschiu Zunge •  
 Wie stêt din ordenunge  
 Waz nû diu mugge ir kunic hât  
 Und daz din êre also zergât!

[Alas! oh German nation,  
 Sad is thy humiliation—

That every midge now has a king,  
 Thine honour is a vanished thing.]

6. *Constitutio pacis Mogunt. 1235, cap. 15*: 'Idem [notarius] scribat omnes sententias coram nobis in maioribus causis inventas maxime contradictorio iudicio obtentas, quae vulgo dicuntur gesamturteil ut in posterum in casibus similibus ambiguis rescindatur *expressa terra secundum consuetudinem cuius sententiatum est.*' See Siegel, l. c., p. 70.

7. For details see Siegel, l. c., p. 72. The importance of the city laws from the point of view of unification arises from the fact that the laws of some of the more important cities were adopted not only by the minor towns standing in dependent relations to such cities, but also by other cities; thus the law of Hamburg was adopted by the cities of Northern Saxony; the laws of Frankfort and Nuremberg by the Frankish towns, &c., &c.

8. The rhymed preface to the German edition of the 'Saxenspiegel,' which is not without poetical merit and is full of shrewd observations quaintly expressed, contains a passage which explains the title as follows:—

Spigel der Saxon  
 Sal diz buch sin genant  
 Wende Saxon reht ist hiran bekant,  
 Als an einem spigele de vrouwen  
 Ire Antlize beschouwen.

[Mirror of the Saxons,  
 Of this book the name shall be;  
 For the Saxons therein their laws may see,  
 As a lady of gentle race  
 In a mirror may see her face.]

9. 'Daz man furbaz . . . allermaniklichen richten sulle und müge nach  
 VOL. XII. D



Kunig und Kaisern seiner vorvarn an dem römischen riche gesetzen und ire geschriben rechten.'

10. As to the introduction of professional judges into Germany generally, see Stölzel, *Die Entwicklung des gelehrten Richterthums in deutschen Territorien*; as to Brandenburg, see the same author's most interesting work, *Brandenburg-Preussen's Rechtsverwaltung, &c.*, vol. i. p. 127.

11. See Siegel, *l. c.*, p. 127. Some time later (1563) a learned lawyer expressed his opinion that such a work could be done by an expert only, and at the same time offered his services, subject to the payment of an adequate fee. *Ibid.* p. 128.

12. As to the laws which prevented him, see Bryce, *Holy Roman Empire*, p. 321 sqq.

13. See Mr. Salmond's interesting article, *L. Q. R.* xi. pp. 121-131.

14. This first part dealt with the law of persons in three books, the second part, published in 1751, with the law of things in eight books. The third part, dealing with the law of obligations and criminal law, was never published. See as to this and the history of Russian law generally, Wernburg, *Preussisches Privatrecht*, vol. i.

15. President Stölzel, whose other works on German and Prussian legal history are quoted above, has written a most interesting biography of this eminent man (Carl Gottlieb Suarez: ein Zeitbild aus der zweiten Hälfte des achtzehnten Jahrhunderts), in which he disproves the legend of a Spanish origin of his name, it is only a corruption of the German name 'Schwarz,' introduced by Carl Gottlieb's father. As to the tendency of scholars at the time in question to give their names a learned appearance, *conf. l. c.*, pp. 8-12.

16. See Stölzel, Suarez, pp. 220-400. Frederick died in 1786, and there were great difficulties to contend with at the last through the influence of Wöllner, who (though Frederick the Great had rejected his application for a patent of nobility on the ground of his being 'a cheating and intriguing parson') had in the meantime become Minister of State and who represented the new code as too revolutionary. It is very doubtful whether the code would ever have been accepted by Frederick William II, had not the partition of Poland in 1793 necessitated the introduction of German law into the new province, for which purpose the new code seemed most appropriate. But the title 'General Code' (*Allgemeines Gesetzbuch*) had to be abandoned, as the king thought that the expression 'Landrecht' was less emphatic and less derogatory to the royal authority. The king's tendencies came out clearly in a trial (reported by Stölzel, *l. c.*) against a liberal clergyman, which had—to a certain extent—been decided in the defendant's favour, upon which the king wrote, 'I cannot understand how sensible people, unless they are badly disposed—as was clearly the case—could produce such nonsense and maintain it against their duty and their conscience.' The judges who had been parties to the decision in question were not to be promoted any more and they were to pay a fine, which—the king added, with grim humour—was to be applied for the benefit of a lunatic asylum. 'Speaking generally,' he continues, 'I am bound to say that my servants in the Courts of Justice (*die Justizbedienten*) have lately assumed a tone which I do not like at all. It is almost as if they were to constitute a sort of "Parlament," which I will never allow them to do; for I will on every occasion rap their knuckles severely (*derbe auf die Finger klopfen*), unless they will get out of this habit. The judgment in question contains passages for which its author would have deserved incarceration in a fortress.'

17. For details as to the localities governed by the 'Landrecht,' see Roth, *Deutsches Privatrecht*, vol. i. §§ 8 and 9.

18. The arrangement somewhat resembles the one adopted by Blackstone. His first book corresponds to the second book of the Prussian Code and vice versa, only the Law of Torts which in the German Code is included in the Law of Things, and the Criminal law included under the Law of Persons, in Blackstone's Commentaries form separate books, respectively called Private Wrongs and Public Wrongs.

19. Stölzel, Suarez, p. 239.

20. See Landrecht, Introduction, §§ 47 and 48; these sections were subsequently repealed.

21. The name first given to it was 'Code Civil des Français,' the title 'Code Napoléon' was imposed by statute in 1807, withdrawn in 1816, re-imposed in 1852 and again withdrawn in 1870, the present title is Code Civil.

22. It also constitutes the law of Belgium, and was imitated by a large number of foreign codes, e. g. the Italian, Portuguese, Spanish, Chilian, and Mexican Civil Codes. It is also the basis of the Civil Code of Lower Canada, and is in force in the Island of Mauritius.

23. The codification of Austrian law had been a favourite scheme of the Empress Maria Theresa, who appointed a Commission for the purpose in 1713; a draft was finished in 1767, but rejected. A second draft was subsequently prepared, and its first part, dealing with a portion of the law of persons only, was in 1787 passed under the name of the Josephine Code. This code is still in force in a part of the Bavarian province of Suabia. See Roth, D. P., I. p. 245, and the authorities there mentioned.

24. See Roth, D. P., I. p. ix; Unger's work on Austrian law (of which only three volumes, I, II, and VI have appeared) is frequently quoted in German courts.

25. See Stölzel, Suarez, p. 447.

26. See German Mercantile Code, s. 1.

27. The Swiss Code of Obligations, which is in force since January 1, 1883, was also of great use.

28. Most interesting details on the work of the first Commission are given by Geheimrath Vierhaus (then a judge of the Court of Appeal in Cassel, now a councillor in the Prussian Ministry of Justice), in his *Entstehungsgeschichte des Entwurfes eines bürgerlichen Gesetzbuches für das Deutsche Reich*. This work also contains a sketch of the previous codes and draft codes.

29. I take this opportunity of expressing my sense of obligation to the Department, who from the time of my first application has regularly supplied me with all information relating to the code published by the Department.

30. The first president was Geh. Rath von Oelschläger, then Secretary of State and now President of the Supreme Court at Leipzig; his successor was the late Geh. Rath Hanauer (then Secretary of State), but the principal part of the work was accomplished during the presidency of Geh. Rath Küntzel (who before his assumption of the presidential chair had acted as vice-president).

31. This was Geh. Rath Planck, one of the two members who had formed part of the first Commission. E. S.

## A POINT ON CONDITIONS IN RESTRAINT OF MARRIAGE.

THE question, whether a condition subsequent in general restraint of marriage is valid, if annexed to a gift of real estate, has elicited conflicting opinions from text-writers of established reputation. The late Mr. Jarman wrote<sup>1</sup> that 'even in regard to devises of real estate, it seems to be generally admitted (though the point rests rather on principle than decision) that unqualified restrictions on marriage are void, on grounds of public policy.' And his editors have not seen any reason to depart from this statement<sup>2</sup>. The late Mr. Joshua Williams, too, expressed the opinion<sup>3</sup> that 'the rules respecting real and personal estate so far agree that a condition annexed to a gift of either, that a person shall not marry at all, is void.' On the other hand Mr. Theobald says<sup>4</sup> that 'a condition subsequent in restraint of marriage, when the estates are for life or in fee, is, it seems, valid as regards realty.' And Sir Frederick Pollock has stated<sup>5</sup> that a condition subsequent in general restraint of marriage is 'good, it seems, as to real estate; at any rate if the disposition, in whatever form, can be taken to show an intention, not of discouraging marriage, but of making a provision until marriage.' Under these circumstances, it may be of interest to call attention to the authorities. Those in favour of the invalidity of the condition, though annexed to a gift of real estate, are the following:—

1. Y. B. 43 Edw. III. 6 a, per Kirton; abridged, Rolle Abr. 418 (6). This is really no more than an argument of counsel, as appears from the Year Book, but it may be considered as having been erected into an authority by its adoption by the Court of Exchequer Chamber in their judgment in *Low v. Peers*, Wilmot's cases, 364, 376. Kirton's proposition was that, if a man leases for life upon condition that if the lessee shall marry *without licence* he shall re-enter, it is a good condition. The Court of Exchequer Chamber pointed out that Kirton added, 'Yet it is a condition against the

<sup>1</sup> Jarm., Wills, 842, 1st ed.

<sup>2</sup> See 2 Jarm., Wills, 892, 5th ed.

<sup>3</sup> Principles of the Law of Personal Property, 427, 11th ed., citing Shepp. Touch. 132; *Perrin v. Lyon*, 9 East, 170, 182, 9 R. R. 520, 529; *Rishton v. Cobb*, 9 Sim. 615, 2 My. & Cr. 145; *Morley v. Rennoldson*, 2 Hare, 570.

<sup>4</sup> Theobald on Wills, 498, 4th ed., citing *Jones v. Jones*, 1 Q. B. D. 279; *Bellairs v. Bellairs*, L. R. 18 Eq. 510.

<sup>5</sup> Pollock on Contracts, 336, 6th ed., citing 1 Atk. 380 n.; *Jones v. Jones*, 1 Q. B. D. 279. [It will be observed that the statement is considerably qualified.—Ed.]

Common Law,' and the court said that, so far as Kirton's *dictum* goes, it is an authority in point condemning such restraints (meaning, apparently, general restraints).

2. *Fry v. Porter*, 1 Mod. 303, 308, where Hale C.B. gave as a reason for holding valid an executory devise over in case the female devisee of an estate tail married without the consent of three persons specified, 'that she is not thereby bound from marriage.' This implies (as is shown in *Low v. Peers*, Wilmot, 377) that if the condition subsequent in that case had been in general restraint of marriage, it would have been void.

3. Shepp. Touch. 132, where it is laid down generally that a condition, that a man shall not marry, is void.

4. *Harvey v. Aston*, Com. 726, 729, per Comyns C.B., that if a portion (i. e. a sum charged on land) were to be given on consideration that a daughter should not marry, such a condition should be rejected 'as repugnant to the original institution of the creation of mankind.'

5. *Low v. Peers*, 4 Burr. 2225, in Cam. Scacc., Wilmot's Cases, 364, where it was held that a contract in general restraint of marriage is void for illegality. It will be seen from the judgment of the Exchequer Chamber already mentioned that the court treated the principle, that a general restraint of marriage is illegal, as established; see Wilm. 376-7.

6. *Keily v. Monck*, in the Irish Parliament, 3 Ridg. P. C. 205, where the Irish Chancellor expressed the opinion that a condition subsequent in general restraint of marriage would be void if annexed to a legacy charged in the first instance on real estate; see pp. 254, 260, 261, 265.

7. *Perrin v. Lyon*, 9 East 170, 9 R. R. 520, where the Court of King's Bench upheld an executory devise over in case the testator's daughter should marry a Scotsman, and Lord Ellenborough C. J. said that he saw no ground for holding the condition to be void, as being in general restraint of marriage, thus recognizing the principle contended for in Mr. Jarman's book.

8. *Egerton v. Brownlow*, 4 H. L. C. 1, 125, where Parke B. instanced conditions or contracts not to marry amongst 'cases in which contracts or provisoes have been held to be illegal on principles long recognized by the Common Law.'

9. *Allen v. Jackson*, 1 Ch. D. 399, where it seems to have been recognized by the Court of Appeal that a general restraint upon marriage is against the policy of the law. The proviso in that case was annexed to a gift of the residue of the testatrix's estate, which would include real estate; and was held to be valid because it restrained second marriage only.

10. *Jones v. Jones*, 1. Q. B. D. 279, where Blackburn J. admitted (p. 282) that there was strong authority that, where the object of a will is to restrain marriage and to promote celibacy, the courts will hold such a condition to be contrary to public policy and void; and Lush J. stated (p. 283) the question in the case to be whether the devise should be construed as a provision for the testator's niece while she remained single, or as a condition that she should remain in a state of celibacy under the penalty of losing her share. By dint of attributing to the testator various motives which he had not expressed in his will, the court brought themselves to decide in favour of the former of the two alternatives put by Lush J. But the actual decision was no more than that the words used in that particular will were equivalent to a limitation to the testator's niece during celibacy. And the posing of the latter alternative was a clear recognition of the principle of the invalidity of a condition subsequent in general restraint of marriage, even though annexed to a devise of land.

11. *Jenner v. Turner*, 16 Ch. D. 188, 197, where Bacon V.C. recognized the general principle above mentioned, but held that a condition that a devisee should not marry a domestic servant was not in general restraint of marriage.

The authorities, which appear to favour the validity of a condition subsequent in general restraint of marriage, if annexed to a gift of real estate, are these:—

1. *Earl of Arundel's case*, Jenk. sixth century, p. 243, where it seems to have been resolved that a condition annexed to an estate tail that the donee shall not marry is void; for without marriage he cannot have an heir of his body; but that it is otherwise of a fee, for the collateral heir may inherit. It is, however, submitted that in this case no question was considered but whether the condition mentioned was void for *repugnancy* to the estate given; and that it is of no authority upon the question whether the condition be void for *illegality*.

2. 1 Atk. 380 n., where it is stated that a condition subsequent in restraint of marriage operates, in the case of real estate, by divesting the estate before vested. At first sight this statement appears applicable to conditions in general restraint of marriage; and so it seems to have been understood by Sir Frederick Pollock<sup>1</sup>. But it should be noticed that the statement in Atkyn is prefaced by the following:—

'With respect to the subject of the above case (i. e. *Harvey v. Aston*, 1 Atk. 361), the following observations occur.'

Now *Harvey v. Aston* was a case of a *particular* restraint on

<sup>1</sup> See ante, p. 36.

marriage; and so it will be found, are all the authorities cited in the note on p. 380 in support of the statement above quoted<sup>1</sup>. The fair inference is, it is submitted, that the statement must be read as applying to *particular* restraints only. And it is exactly with regard to particular restraints on marriage, that is, to conditions requiring the consent of some specified person or persons to marriage, that a distinction has been established between the rule of the common law applicable to gifts of land or money charged thereon and the rules of equity applicable to gifts of personalty<sup>2</sup>.

3. *Bellairs v. Bellairs*, L. R. 18 Eq. 510, 513, where the late M. R. said, 'In the present case the law is settled thus far, that a general condition prohibiting marriage, by which a legacy is cut down, is void. I consider that to be the law of the courts of equity. It is equally the law of these courts that a charge on land does not follow the same rule, it follows the rule of the common law, as it is called, as distinguished from the rule of equity.' It is to be observed, however, that it was not necessary to the decision of the case that a judicial definition should be given of the common law rule as to conditions subsequent in general restraint of marriage, by which devises of land and charges on land are governed. For the point decided was simply that a gift of the income of a mixed fund arising from the proceeds of sale of real and personal estate was to be regulated by the law applicable to gifts of personalty. It appears too from the report<sup>3</sup> that six eminent counsel, appearing for various parties, with one accord maintained that 'the rule that conditions in restraint of marriage are void is unknown to the common law; it was borrowed by the Ecclesiastical Courts from the canon law, and applies only to gifts over which those courts had jurisdiction, viz., money legacies and gifts of pure personalty.' This was their major premiss, their minor being that a gift of a mixed fund, at all events so far as the fund represents the proceeds of real estate, is governed by the rule applicable to gifts of land. The M. R. decided against them without hearing counsel for the opposite side, so there was no opportunity of citing the authorities, which establish the common law rule against restraint of marriage. But the ground of the decision against them was that their minor premiss could not be sustained, either on principle or authority. The worth of their major premiss was thus rendered irrelevant: but the late learned judge, whose knowledge

<sup>1</sup> These are 1 Rolle Abr. 418, pl. 6; *Fry v. Porter*, ubi sup. (as to which see pp. 36, 37 above); and *Pullyn v. Ready*, 2 Atk. 587.

<sup>2</sup> See *Fry v. Porter*, ante, p. 37; *Reves v. Herna*, 5 Vin. Abr. 343, pl. 41; *Harvey v. Aston*, 1 Atk. 361; *Pullyn v. Ready*, 2 Atk. 587; *Reynish v. Martin*, 3 Atk. 330; *Scott v. Tyler*, 2 Dick. 712, 719.

<sup>3</sup> L. R. 18 Eq. 511, 512.

of the common law was not equal to his acquaintance with the principles of equity, was unfortunately misled into accepting it.

It is not easy to understand how it can be maintained, in the face of the decision in *Low v. Peers* before mentioned, that there is no rule of the common law against general restraint of marriage. But of course *Low v. Peers* was not cited by the counsel who were heard in *Bellairs v. Bellairs*.

4. Mr. Justice Blackburn, in his judgment in *Jones v. Jones*, 1 Q. B. D. 279, 282, seems to lay down that the rule of the invalidity of conditions in general restraint of marriage was adopted from the ecclesiastical or civil law by the courts of equity and is inapplicable to a devise of land, which is governed by the rules of the common law; though, as we have seen<sup>1</sup>, he admitted that there is strong authority that when the object of the will is to restrain marriage and to promote celibacy, the court will hold such a condition to be contrary to public policy and void. It seems impossible to avoid the conclusion that his lordship's judgment in this case was either ill-reported or ill-considered. The truth appears to be that it is the rule relating to the invalidity of *particular* restraints on marriage which was adopted by the courts of equity from the ecclesiastical law and is inapplicable to a devise of land<sup>2</sup>. As has been already pointed out<sup>3</sup>, a rule of the common law, prohibiting general restraint of marriage as being against public policy, was certainly established directly in *Low v. Peers*. And it was settled in *Egerton v. Earl Brownlow*<sup>4</sup> that an executory devise over to take effect upon the non-fulfilment of conditions, which it is against public policy to impose, is void.

It is submitted that the weight of authority is decidedly in favour of the opinion that a condition subsequent in general restraint of marriage is invalid, though annexed to a gift of real estate.

T. CYPRIAN WILLIAMS.

<sup>1</sup> Ante, p. 38.

<sup>2</sup> See the cases cited in note 2 to p. 39 above.

<sup>3</sup> Ante, p. 37.

<sup>4</sup> 4 H. L. C. 1.

## CREDITOR AND DEBTOR IN INDIA.

A SUBJECT of vast practical importance to the majority of the population of India has recently been brought into prominent notice by a debate in the Legislative Council at Calcutta. The Honourable Mohiny Mohun Roy moved for permission 'to introduce a Bill to regulate the award of interest in suits for simple money debts and mortgage debts <sup>1</sup>.' A debate followed, in which it was admitted by every member who spoke that the object of the Bill was extremely desirable. Sir Griffith Evans pointed out that 'the peasantry are being divorced from the land. If they are allowed to till their ancestral holdings at all, it is as serfs of the money-lenders. In the old days the usurer could only take the crop and not the land. Under our laws both are taken <sup>2</sup>.' Permission was given to introduce the Bill. It consists of a single section, which is admittedly in a tentative form, subject to be recast in the light of suggestions which have been sought for in every province and administration of the Empire. The Bill practically opens up the complex question of the relation of creditor and debtor in India.

The population of India is in the main agricultural, and it dwells in villages rather than in towns. Nine-tenths of the population are found in villages, each of which does not number more than five thousand souls; more than four-fifths dwell in villages which have less than a thousand inhabitants apiece. The general mean population per village is 363 <sup>2</sup>. In many of these small cultivating communities there resides a village money-lender; and he and his forefathers have probably resided in that same village for generations. When the village is very small, the inhabitants may have no money-lender of their own, and then when occasion demands they resort to another village to negotiate a loan. If a village is large or rising in prosperity it may support a second or a third money-lender, but as a general rule each money-lender or village banker has his own *clientèle*, and regards a new customer with a certain amount of probably well-founded suspicion, for he likes to know as much about each of his customers as if he were his family solicitor. The ordinary agriculturist is fairly thrifty and economical, and if the seasons go well with him, he saves a little

<sup>1</sup> Gazette of India, Extraordinary, March 13, 1895, pp. 11-16.

<sup>2</sup> Census of India, 1891, General Report, p. 49.



money and invests it in jewellery for his womankind or buries it under the mud floor of his hut. In good years the village banker looks to grain-dealing rather than usury for his gains. If a bad year comes, the thrifty peasant pulls through the first and even the second bad season, but he can rarely hold on longer than this. The marriages of his children again are occasions on which it is a point of honour with him to follow the custom of his ancestors and launch out into extravagant expenditure. His horn is exalted among his neighbours in proportion to the number of guests whom he entertains, and the *largesse* which he distributes. The entire income for one or two good years is frequently thus spent. I have personally known instances in which a guardian has applied for permission to spend one-half, two-thirds, and even the whole of a ward's property upon marriage expenses: the guardian has upon such occasions gone away disgusted with the court for refusing what seemed to him or her a perfectly reasonable request. There are other ceremonies also which are made an occasion for extravagance, but as these are mostly observed by the well-to-do classes, they need not be specified in the present connexion. Weddings and bad harvests are what usually bring the cultivator to the village money-lender. If the borrower is in no previous difficulty, he has no difficulty in getting money on the security of his land at one per cent. *per mensem*; if he is also known to be a man of probity he may get the same terms upon a simple money bond. An advance for purposes of cultivation is often made upon a contract to repay the same with 25 or 50 per cent. interest after the next harvest. In such a case the banker has in addition to his interest the advantage of the market prices, for seed-grain is dear at sowing time, and grain is at its cheapest when the banker recoups himself for his advance. The terms which have been mentioned may seem high to English readers, but they are customary in an Indian village, and there are very few cultivators, and not many landlords, who would dream of asking for more favourable rates. They are terms on which loans can be, and very frequently are, repaid when the time for repayment arrives. It is when the debtor gets behindhand with his payments that his trouble begins. The banker, if he has any doubt as to his client's future solvency, insists upon ample security in the shape of a simple mortgage, and in this he is certainly justified, for an ordinary cultivator, when he is in pecuniary difficulties, is apt to lose his little stock of probity and to seek to indulge in very shady transactions. He will give a second and a third mortgage without any mention of a prior encumbrance, merely thanking his gods for the accommodation which he has received. Occasionally he manages to grant an

usufructuary mortgage to a mortgagee who takes possession and then immediately turns out and puts him in as his lessee. Even without trickery of this kind, the debtor who falls behindhand has great difficulty in making up leeway, and in a very great many cases he is sold up. He loses his proprietary rights: he may stop on as the tenant of the auction-purchaser: his ultimate fate is probably that of a tenant-at-will, paying over to his landlord everything except the pittance which suffices to keep the bodies and souls of himself and his family together. That the transfer of land is going on at an alarming rate the statistics of the Registration Department show only too clearly. The fact is known and admitted and universally deplored. The transfer of land in an old-world conservative country such as India wears quite another aspect, and bears quite a different meaning from a similar amount of transfer in a young or a commercial country. As Sir Griffith Evans says in the speech from which I have already quoted: 'It is one of the grave political dangers of the future. For their lands the peasantry have always been ready to fight and die. We are ousting the warrior peasantry by our laws and courts to put in the usurer. We shall want our army one day to keep him in.'

It is not merely that the old proprietors are ousted. This has happened time after time all over India. In Bundelkhand, the earliest conquerors and landowners of whom we have record were the Chandels, and there are Chandels still in the land. The Chandels as a body however were ousted by the Ranghars, and they in their turn were ousted by the Bundelas, who gave their name to the country, but who lost their land to the Mahrattas and Musalmans. In Azamgarh the Rajbhars and other low tribes were at one time lords of the soil. The Bhuinhars, a high caste race who claim Brahmanical descent, swept out the Rajputs who had already swept out the Rajbhars, and they were followed by the tide of Muhammadan conquest. Rohilkhand, to take another example, is called after the Rohillas, and they only date from the beginning of the last century. What has happened in Bundelkhand is but typical of what has happened almost universally throughout the plains of India. One set of landholders has been ousted by another, and has henceforth occupied an inferior position in the social scale. Rajputana is the only considerable exception. But in these changes the new proprietors, though militant, have also been agricultural. Their tastes and their sympathies have been akin to those of the men they dispossessed. With their own right hands they kept their own; but they and their predecessors could live together, after a time, in more or less of peace and amity, for they understood and appreciated one another. But with the banker-

landlord it is not so: he is not a cultivator himself; his sole idea is to rack-rent his tenants, and he is usually an absentee landlord.

The money-lender has existed from the time whereof the memory of man runneth not to the contrary, and in fact he existed long before the first year of Richard I. But it is only under our protection that he has become a landlord. The laws of Manu contemplate a temporary alienation of the land, whereby a mortgagee might recoup himself out of the rents and profits, but a sale of the proprietary interest is nowhere mentioned. Such an infringement of caste occupation is foreign to Hindu ideas. The truth and falsehood of trade was the province of the Banya, and agriculture was outside his scope. 'Within the circle of the Vaisya, or colonists of Aryan descent, function became hereditary through trade guilds, in imitation of the higher classes<sup>1</sup>.' It is only the Pax Britannica which has rendered it possible for the money-lender to creep into the land-owning classes. Even though a money-lender purchased land at an auction sale held in execution of a decree, he still dared not go near the place. Twenty-five years ago Sir Auckland Colvin reported that there were villages within a few miles of him 'where it is as much as the auction-purchaser's life is worth to show his face unattended by a rabble of cudgellers.' Sir William Muir in 1872 wrote that 'the state of the law and the action of our courts have thrown the new proprietors and the old cultivating communities into a bitter antagonism which ends too often in riot and bloodshed.' Every year renders the population more law-binding, but there are numerous Thakur and Jat and Gujar villages in which an auction-purchaser would be very little safer to-day than he would have been twenty years ago. Economically and politically it is in India an evil that the land should thus be divorced from its old proprietors. The auction-purchaser is some wealthy money-lender living in some large town: he is an absentee landlord, and his general method is to break up every species of tenant-right whenever possible, and to reduce all his tenants to the position of tenants-at-will, whereby permanent improvement becomes impossible and good husbandry is discouraged. Nor is the evil merely economic, it is also political. It is said that numbers of the old proprietors in Rohilkhand, who stood with us during the Mutiny, would in another mutiny join the rebels. They have lost their estates and their loyalty has gone by the board. The Census of India Report for 1891 shows that two-thirds of the money-lenders in Assam are now landowners; in Bombay and the Central Provinces the proportion is about one-

<sup>1</sup> Census of India, 1891, General Report, p. 183.

third; in Madras and the Punjab it exceeds one-sixth; while in the North-Western Provinces it is nearly one-half. There is a remarkable difference between British India and the Native States, 'where for the most part the transfer of land to a creditor is unusual, if not unlawful,' and the writer of the Report remarks that as regards the extent to which the land is passing into the hand of the money-lender, 'the evidence of the census as it stands is not at all reassuring' (p. 116). So much as regards the evil: I will now consider the proposed remedies.

The remedy proposed by the Honourable Mohiny Mohun Roy in the Viceroy's Legislative Council was the reintroduction of the Rule of Dāmdūpat. This rule, the rule of double principal, was to the effect that no creditor, whether his bond carried simple or compound interest, should recover more as interest than the amount of his principal. If a creditor lent one hundred rupees then, whatever the terms of his contract were, and no matter how long he delayed in bringing his suit, he could not recover more than two hundred rupees. The rule did not extend to transactions in grain, but for money transactions between Hindus it was undoubtedly, so far as there was any common law, part of the common law of India. It is given in Manu (viii. 151): 'In money transactions interest paid at one time shall never exceed the double.' The same rule is found in the older law-givers. In the Institutes of Vishnu (vi. 11) it runs thus: 'On gold the interest shall rise no higher than to make the debt double.' In Brihaspati, in Katyayana, and in Yajñavalka, the same rule is given. The rule as laid down by the sage Gautama (xii. 31) stands thus: 'If the loan remains outstanding for a long time, the principal may be doubled, after which interest ceases.' Narada states that the rule of Dāmdūpat is the paramount rule, although the rate customary in the country may be different. There is no doubt that, as between Hindus, transactions were governed by this rule. As between Muhammadans interest was forbidden altogether by the Kuran. For transactions between Hindus and Muhammadans there was no rule, and there could be no rule so long as the law depended upon a religious sanction. The rule of Dāmdūpat was adopted by the East India Company in their Regulation XV of 1793, and it appears to have been adopted as a useful customary rule which it was well to recognize officially. In section 8 of a regulation dated August 21, 1772, it is recited that 'the rates of interest hitherto authorized by custom have amounted to the most exorbitant usury.' Beyond this recital I know of no authority for saying that the old rule had fallen into disuse, and I think that the balance of probability is in favour of the existence of the rule which down to the present day

nominally obtains for transactions between Hindus in the city of Calcutta and the presidency of Bombay. Be the case as it may as to the existence of the rule from the time of the old law-givers down to 1793, the old rule was in that year adopted by the East India Company for Bengal, and the same rule was extended subsequently to the North-Western Provinces, Madras, and Bombay. In Oudh the rule was still more in favour of the borrower, the utmost interest recoverable being limited to fifty per cent. The law stood thus down to 1855, when an Act was passed (No. XXVIII of 1855) 'for the repeal of the Usury Laws.' The preamble recites that 'it is expedient to repeal the laws now in force relating to usury.' The Act repeals those laws, and then in section 2 enacts that 'in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the court at the rate (if any) agreed upon by the parties, and if no rate shall have been agreed upon, at such rate as the court shall deem reasonable.' This section has been generally interpreted in its obvious sense, as overriding the rule of *Dāmdūpat*, and giving the parties to a contract power to make what terms they please. Except in the High Court at Bombay I believe that the law is now generally recognized as it has been enunciated in a minute<sup>1</sup> by Sir John Edge, Q.C.: 'A judge is, by reason of section 2 of Act No. XXVIII of 1855, bound to decree interest in accordance with the contract, unless the contract is proved to have been an unconscionable one, or to be tainted with fraud, or to have been made by the defendant in ignorance of the true nature of the transaction, or, in cases to which that doctrine applies, to have been obtained by undue influence.'

If the old rule is to be reintroduced, not only will it be necessary to repeal a law of forty years' standing, but it will be necessary also to alter the existing law of evidence. The rule of *Dāmdūpat*, where it still exists, is evaded every day by the principal being inflated for the purpose of the bond. A creditor lending a man one hundred rupees will, according to the risk he is running, take a bond for one hundred and twenty-five or one hundred and fifty: and in the Deccan Agriculturists' Relief Act it was found necessary to enable courts to go behind the bond and to investigate the actual consideration irrespective of the terms of the bond. That Act was of local and temporary application, while the change now under consideration is to be universal throughout India and permanent. At present the law is that where a contract in writing has been proved 'no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying,

<sup>1</sup> Pioneer, June 23, 1895.

adding to, or subtracting from its terms.' This section (92 of the Indian Evidence Act) is followed by six provisos, which I need not recapitulate here. It is now suggested that a further proviso be added in the following terms: 'In any action founded upon a written contract for the payment of money, if the court has reason to suspect that the true consideration for the contract is other than that which appears upon the face of the document, it may, if it shall think fit, require the plaintiff to prove his case by evidence independent of the document.' It is manifest that such an addition to, or rather such a reversal of, the existing law will open a wide door to the exercise of bad faith and perjury on the part of the debtor, and will act as a stimulus to a fraudulent creditor to keep false account-books in order to prove false considerations entered in his bonds. It will throw a large amount of extra work upon the courts, and be correspondingly expensive. Where no regular account-books are kept 'it will be extremely difficult for the courts to ascertain the facts and do justice between the parties.' As the Commissioner of Benares points out, 'there are a large number of zamindars who do not keep regular books, but lend on bond drawn up after settlement of accounts, which accounts are destroyed, and even if kept would be altogether untrustworthy.' The amendment would tend to destroy the trade of this class of petty money-lenders, and to drive men in difficulties at once to the larger bankers who, not having such an intimate knowledge of their customers' affairs, would be bound for their own protection to exact harder terms. Furthermore, the amendment will tend to destroy the wholesome respect which exists for an instrument in writing. Every debtor knows the difference between being merely on his banker's books and being bound by a written bond. When the bond is enacted he knows that his liability has entered upon a new and acute stage. The bond is drafted and its terms are read out, a fair copy is made, and the creditor takes care that the debtor's signature shall be witnessed by at least two respectable witnesses. The consequence is that in the majority of instances the fact of execution is not denied. In nearly all deeds affecting land, the additional safeguard of registration is exacted by the law, and execution is admitted by the executant in presence of an official registrar, and is endorsed upon the bond. The value of registration is so thoroughly appreciated that it is now adopted throughout Rohilkhand in the case of contracts to deliver sugar-cane juice, although such contracts are not by law necessarily subject to registration. The existing law as to the execution of instruments is well understood, appreciated, and respected by creditors and debtors; the proposed amendment, which enables

a debtor at will to back out of his bond and to throw the burden of proving consideration upon his creditor, will certainly encourage and benefit the dishonest debtor, and what the creditor loses by him, he will have to make up out of the honest debtor.

Assuming that the rule of *Dāmdūpat* could be made effective, it would in many cases have the inconvenient result of 'cutting down the period of the loan or mortgage below the period for which the parties would otherwise have desired to contract.' Property might thus be brought to sale, where otherwise the creditor would have been content with his security, and at a time when bad seasons caused the prices of land to rule low. As the Legal Remembrancer to the Local Government of the North-Western Provinces and Oudh points out, 'The standing difficulty is to devise any measures that cannot be evaded, and that will not be productive of increased injury to the debtor.' The reintroduction of the old rule of *Dāmdūpat* would, in my opinion, be a measure retrograde and harmful.

Several authorities, who are opposed to this rule and the consequent amendment of the Indian Evidence Act, rely upon the equitable jurisdiction of the Indian courts in dealing with hard or unconscionable bargains. That such equitable jurisdiction exists in an Indian court has been held by the Judicial Committee of the Privy Council, and their ruling has been followed by the High Courts, I think, each presidency. The question is not so much as to the existence, but as to the exercise, of the power of interference with a hard or unconscionable bargain. In giving effect to a contract the Indian courts are bound by the Indian Contract Act and other written laws: these contain certain hard and fast rules with no elasticity or room for growth and expansion. A rule of law in India is of little use unless it is one which the humblest munsif in the province feels safe in exercising, and the rule as to hard or unconscionable bargains, as it has been interpreted in the Indian courts, is certainly not free from difficulty. As the Legal Member of the Legislative Council stated during the debate upon the Honourable Mohiny Mohun Roy's motion: 'The object of restraining hard and unconscionable bargains is a very desirable one, but I am afraid I must admit that it is one that the Court of Chancery has been endeavouring to give effect to for something like three hundred years with very varying success.' Sir Alexander Miller may be right or wrong as regards the Court of Chancery, but there can be no doubt that the restraint of such bargains by the court of the Indian munsif is practically out of the question with the law as it at present stands. The Contract Act lays down that certain contracts are void and that certain other contracts are voidable: it does not say that a contract is voidable because its

terms are hard or unconscionable, while on the other hand section 2 of Act No. XXVIII of 1855 does say that interest is to be adjudged at the rate agreed upon between the parties. There is nothing in the codified law to differentiate a transaction which arises out of the necessity of one party and which puts him to some extent in the power of the other from a transaction in which 'the parties are on such a footing as to be presumably of equal competence to understand and protect their respective interests in the matter in hand <sup>1</sup>.' The necessity for some such provision has suggested the following amendment of the Indian Contract Act: 'In any action founded on contract, if from all the circumstances of the case the court is of opinion that the parties were not at the date of the contract upon equal terms with respect thereto, it may, if it shall think fit, require the party with whom the advantage lay to prove the good faith of the transaction.' Whether the terms of this amendment are sufficient to provide in all cases against 'the taking of undue advantage of a debtor's simplicity or necessities' may be open to question, but it is certain that if the principle is to be exercised by the courts of the lowest grade, it must be incorporated in the codified law. Our system of codification in India does not possess that power of expansion and growth which adapts unwritten law to the necessities of cases as they arise, and hence protection against hard or unconscionable bargains, if it is to be secured at all, must be secured by some such express enactment as the amendment above suggested.

There is a third set of authorities who, while not disapproving the enunciation of the equitable doctrine of hard bargains in a form which shall make it part of the working law of the Munsif's court, think that something further is necessary. They advocate, in the words of Mr. Justice Aikman <sup>2</sup> in his official minute to the Local Government of the North-Western Provinces and Oudh, 'greater restrictions on the transfer of land from the land-owning and land-cultivating classes.' The old law for tenants, as laid down in Harington's Analysis, was that as long as a tenant living in a village paid his rent for the land which he cultivated in that village, he could not be ousted from his land. In some provinces the British Government has, in the case of tenants who have cultivated for a certain term of years, attempted to protect the tenant against any transfer of the land to any one who is not a co-sharer with him in the cultivation. A transfer to an outsider, or in execution of a decree, is thus rendered illegal, and the tenant-right loses its value as security for debt. No such general attempt has been made to protect the land-owning class by direct legislation, but

<sup>1</sup> Pollock on Contract, p. 598, 6th ed.

<sup>2</sup> Pioneer, June 23, 1893.



indirectly attempts have been made, in certain classes of cases, to thwart the execution of civil court decrees. A distinction has been drawn between ancestral and acquired property. In the case of decrees ordering ancestral property to be sold, a local government is empowered to notify that such decrees shall in every case be made over to the revenue department for execution, and I believe that all local governments have issued notifications to this effect. When the revenue department, in other words the collector of a district, gets such a decree to execute, his instructions are to satisfy the decree in any other way in preference to selling the land. He may farm the land himself, let it out on a term of years or in perpetuity on payment of the largest premium obtainable, mortgage the whole or part, invite tenders for a lease or farm, or may sell part of the property. The resources of the most powerful department in the government are thus invoked to save the landholder from impending ruin. In very many instances however nothing can be done. The decretal debt is overwhelming and sale is inevitable. So often is this the case, that the provisions of the law intended thus to protect the debtor are recognized as a legislative failure. 'It is generally admitted,' says Mr. Justice Aikman in the minute already quoted, 'that the provisions of sections 320 to 327 inclusive of the Code of Civil Procedure have not been found in practice at all adequate to effect the object with which they were enacted.' The natural result of such provisions is to produce a state of uncertainty and risk and delay, for which the creditor takes the precaution to charge accordingly.

In some cases the State has not hesitated boldly to deprive certain landholders of the capacity to transfer their land. The history of the *istimrārdārs* of Ajmer is a case in point. They were immersed in debt, and before the days of the British raj, it would have mattered little. Their creditors would have got out of them all the money they could, but would never have dared to come near their estates. A short shrift and a long rope were ready for any such infringement of custom. But through the agency of the civil courts, the creditor collects his debts with ease and accuracy, and the court executes his decree at the expense of the judgment-debtor. The *istimrārdārs* were so deeply involved, that the State made terms with their creditors on behalf of the bankrupts, and gave them back their estates again but took from them their capacity of alienation. No *istimrārdār* now can permanently alienate his estate, nor can he alienate or charge it by lease, mortgage or otherwise for any term beyond his own life. Each man's estate is thus entailed, and he cannot bar the entail. A somewhat similar measure was adopted for the benefit of encumbered estates in the

Jhansi division. Money was advanced by the State to the bankrupt landholder, whose proprietary interest was thereupon mortgaged to the Secretary of State for India in Council, and the landholder, from the date when the first official notice was given to his creditors by publication in the Gazette, became legally incompetent to sell, exchange, mortgage, give or lease his proprietary interest in his land or in part thereof. The fact that the Jhansi landholders are able to pay off their State mortgages shows the recuperative property of an estate, after allowing for the bad seasons which inevitably come. The value of land as an investment is shown by the eagerness, not only of the money-lender, but of the native lawyer, to get hold of it. 'The lawyer again has his eye on land in the present day, and the fact that so shrewd a class should think it worth while to invest in this form of property is a testimony in favour of the current system of assessment and administration<sup>1</sup>.' In the interest of all that is left of the hereditary landholding classes, and their numbers though dwindling are still very considerable, it has been proposed that the State should refuse its aid to a certain extent in exercising decrees against land, not as heretofore by interposing an uncertain and tedious procedure, but by adding to those particulars which, under the Code of Civil Procedure, are declared to be not liable to attachment and sale, the following:—

(a) One moiety of the recorded proprietary interest of any landholder in any revenue-paying or revenue-free estate.

(b) Any recorded proprietary interest paying land revenue of less than a certain minimum amount.

The effect of these measures would be to render all estates in the latter class, and one-half of all estates which were twice that value, valueless as security for debt. The principle which underlies this interference with freedom of contract is that a man should not be allowed to deprive himself utterly of all power of getting his customary living. It is the same principle which in the First Statute of Westminster provided that in raising amercements, the freeman was to have his freehold exempted, the merchant his merchandise, and the villan his waynage. It is a principle which is naturally distasteful to the law reformer who holds that the transfer of realty should be as simple and unrestrained as the transfer of personalty. Our administration of India is however in some points an object-lesson in the risk of ill-considered and unnecessary reforms. The 'fetters of land' in England were only removed when England had ceased to be an agricultural and had become a manufacturing and commercial country. In India two-thirds of

<sup>1</sup> Census of India, 1891, Report, p. 116.

the people still get their living from the land. The reign of custom has not yet given way to the reign of contract. The people are illiterate and intensely conservative, and they hate the ruthless and irresistible hand of the civil court which strips them of their land and turns them over to be rack-rented by their creditors. It has of late years been recognized that some of the most cherished maxims of political economy are not truths in the same sense as the axioms of Euclid, and that they depend for their value upon their environment in time and place. It is so in India with capacity of alienation and freedom of contract. There is lamentable and overwhelming evidence to show that the landowners and cultivators of India are, as classes, unfit as yet for the exercise of these unrestricted rights. It is therefore necessary to devise a remedy which shall stop matters from getting worse. The rule of *Dāmdūpat* is now out of date; even where it is recognized, it is systematically evaded; to reintroduce it without altering the law of evidence will be useless, and if the law of evidence is altered a wide door is at once opened to forgery, perjury, and bad faith. The rule as to unconscionable bargains is a rule which leaves much to the courts' discretion, and a rule upon which Indian authorities are anything but clear and unanimous; it is a rule therefore which courts, whose decisions are open to first and second appeals, will never venture to work unless it is in clear terms added to the codified law. 'It is simpler and safer to go at once to the root of the matter, and to deprive the landholder to some extent of the security value of those rights and interests which he is unable to safeguard, but which it is for the public policy that he should be restrained from utterly losing. The rights remain to him as valuable as before for the rents and profits which they produce, and for the status which they confer; they merely lose a part of the value which they now possess as a temptation to extravagance, debt, and ultimate insolvency<sup>1</sup>.'

EUSTACE J. KITTS,  
Judge of Bareilly, N.W.P. India.

<sup>1</sup> *Pioneer*, May 18, 1895.

## SERVICE UNDER ORD. 48 A.

FEW questions of practice and procedure have, during the last few years, been of deeper practical interest to litigants, and evoked more numerous and conflicting judicial pronouncements, than the question of service of writs on firms, and what may conveniently be called quasi-firms. It should be explained that, before June 19, 1891, a quasi-firm was 'one person carrying on business in the name of a firm apparently consisting of more than one person,'—since that date it has been 'a person carrying on business . . . in a name or style other than his own name.'

The desirability of enabling a partnership firm to sue and be sued in the firm name, instead of in the names of the individual partners, not necessarily known to the litigant of the other part, was probably impressed upon the minds of the English rule-making authorities by observation of the Scotch practice (see the speech of Lord Selborne L. C., in *Munster v. Cox*, 10 A. C. 682). In the first Schedule to the Judicature Act, 1875, O. 9, r. 6 provided for serving a partnership firm with a writ in the firm name upon any one or more of the partners, or at the principal place of business within the jurisdiction on any person having at the time of service control or management of the business there. This latter form of service, which I shall frequently have to refer to in connexion with firms and quasi-firms alike, I propose to call shortly 'service *per manager*.' O. 12, r. 12 provided for the mode of appearance. O. 16, r. 10 laid down the method by which 'any two or more persons claiming, or being liable as copartners,' might sue and be sued, with a provision to enable persons involved in litigation with a partnership firm to obtain information as to the *personnel* of the firm. O. 7, r. 2 provided for a declaration of individual names to be made, if required, by partners suing as a firm. O. 42, r. 8 laid down the method by which, and the limitations under which, judgment against a firm might be enforced. Shortly stated, the effect of this rule was that, on judgment obtained against a firm, execution might issue against any property of the partnership, or of a partner who had personally appeared, or had failed to appear after being personally served, or had, by admission or adjudication, had the fact of partnership proved against him. Further, by leave of the court, at the instance of the party who had obtained

judgment, execution might issue against any other person whose liability was not disputed, and provision was made for trying liability in cases in which it was disputed. It was not long before it seemed convenient to put quasi-firms on a footing to some extent similar to that of firms proper. In June, 1876, were enacted O. 9, r. 6 a, in language closely following, *mutatis mutandis*, the language of O. 9, r. 6,—O. 12, r. 12 a, closely following O. 12, r. 12,—and O. 16, r. 10 a, providing that any person carrying on business in the name of a firm apparently consisting of more than one person might be sued 'in the name of such firm.' It is not necessary for our purpose to trace the various slight changes made from time to time in these rules up to June 1891, when they, or rather the rules then representing them, together with O. 45, r. 10 (garnishee orders against firms, added August, 1888), were repealed, and O. 48 a, rr. 1-11, enacted in lieu thereof. To some of these changes I may have occasion to refer; but, speaking generally, it may be said that the general scheme and scope of the rules relating to firms and quasi-firms remained unchanged until 1891.

It is remarkable that the old rules relating to service on firms and quasi-firms were drafted in such a way as to be generally misunderstood, so far as their bearing on persons outside the jurisdiction was concerned, until 1889, when *Russell v. Cambefort*, 23 Q. B. D. 526, was decided by the Court of Appeal. We shall find it convenient to set out the text of R. S. C. 1883, O. 9, rr. 6, 7.

O. 9, r. 6. 'Where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and subject to *these Rules*, such service shall be deemed good service upon the firm.' [Identical with O. 9, r. 6 of the Rules of 1875, save that the words in italics are substituted for 'where partners are sued,' and 'the rules hereinafter contained.']

O. 9, r. 7. 'Where one person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on upon any person having at the time of service the control or management of the business there, and *such service, if sufficient in other respects*, shall be deemed good service on the person so sued.' [Identical with O. 9, r. 6 a (1876), save that the words in italics are substituted for 'subject to any of the Rules of the Supreme Court, such service.']

The difficulties raised by the language of the old rules, and the differences of judicial opinion as to their application, may be plainly

seen on a careful study of the following cases in their different stages:—*O'Neil v. Clason* (1876), 46 L. J. Q. B. 191; *Pollexfen & Co. v. Sibson & Co.* (1886), 16 Q. B. D. 792; *Russell v. Cambefort* (1889), 23 Q. B. D. 526; *Shepherd v. Hirsch, Pritchard & Co.* (July, 1890), 45 Ch. D. 231; *Western National Bank of City of New York v. Perez, Triana & Co.* (December, 1890), '91, 1 Q. B. 304; *Lysaght Limited v. Clark & Co.* (March, 1891), '91, 1 Q. B. 552; *Indigo Co. v. Ogilvy* (March, 1891), '91, 2 Ch. 31; *Heineman & Co. v. Hale & Co.* (May, 1891), '91, 2 Q. B. 83; *Dobson v. Festi, Rasini & Co.* (May, 1891), '91, 2 Q. B. 93. The reader will observe that almost all the possible combinations have happened, except the two, either of which would have forced the learned judges to state the governing principle in language of rigid precision, *sc.* the case of a firm of partners, British subjects and domiciled Englishmen, but one or all of them temporarily outside the jurisdiction, and the case of a quasi-firm conducted by such a person, temporarily so resident, having a manager and place of business in England. The case of *Russell v. Cambefort* deserves special attention, as having turned the current of decision, if not of judicial opinion. I would also draw attention to the dissenting judgment of Lord Esher M. R. in *Western National Bank of New York v. Perez, Triana & Co.* (which, with respect, I think the first attempt to deal with the subject systematically), and to the observations of Chitty J. in *Shepherd v. Hirsch, Pritchard & Co.* The decisions in that case and in *Lysaght Limited v. Clark & Co.* seem to be against the current of authority, and would probably have been reversed on appeal.

Having the remarkable conflict of judicial opinion disclosed by these cases before our minds, it is not too much to wish that *Russell v. Cambefort* had gone to the House of Lords, and not too much to say that arguments of weight might have been addressed to that tribunal against the judgment of the Court of Appeal. This is not the place to elaborate those arguments, but it may be allowed to me to suggest that the learned Lords Justices took too grave a view of the evils which would ensue, if they gave their natural meaning to the general words of the rules which they had to construe. It has always seemed to me that, as procedure under those rules, even when intended to affect the position of persons outside the jurisdiction, did not involve any service of process outside the jurisdiction, and, under the circumstances, involved no real risk of the person attacked not being duly apprised of the proceedings, and as judgment obtained in England upon this or any other procedure could, *proprio vigore*, only affect property within the jurisdiction, the risk of an offence against natural equity, or the comity of nations, of territorial governments under the same Crown, or of courts having

exclusive local jurisdiction over different parcels of territory under the same Crown and Legislature, is much slighter than has been supposed. And, as a matter of interpretation, I have always thought that due weight has not been given to the inferences to be drawn from the presence in the rules under consideration of the words 'at the principal place within the jurisdiction of the business,' considered with reference to their context. It is also a curious thing that the significance of O. 45, r. 10 (added August, 1888, *scilicet* in the interval between *Pollexfen v. Sibson* and *Russell v. Cambefort*) never seems to have been noticed. I think if the date of this rule<sup>1</sup> is considered, and the frame of it carefully examined, it will go far to show that the Rule Committee did not then think the rules as to service on firms and quasi-firms to be wrongly interpreted in *O'Neil v. Clason* and *Pollexfen v. Sibson*. If the Rule Committee had thought those decisions wrong, it is much more likely that the rules interpreted by those decisions would have been altered, than that a new rule dealing with garnishee orders on firms would be added, in a form which harmonizes much better with the other rules, as interpreted by those decisions, than as interpreted by *Russell v. Cambefort*.

Having regard to the fact that the new rules, as interpreted by the Court of Appeal in *Worcester City and County Banking Co. v. Firkbank, Pauling & Co.*, '94, 1 Q. B. 784, have so altered the condition of affairs that if *Russell v. Cambefort* could come round again, with the alteration in the rules as the only new factor in the case, the service would be held good, it seems at first sight superfluous to make any observations upon a question now purely academical. We shall see, however, that the influence of that decision is not yet spent.

But whether *Russell v. Cambefort* was wrongly decided, and imported an unnecessary difficulty into the application of the Rules of Court, or was rightly decided, and disclosed a fault in the Rules, which, owing to a happy misunderstanding, had given rise to no practical inconvenience until 1889, it is matter of history that the Rules, as glossed by the Court of Appeal, became manifestly inconvenient, and conduced to the delay, if not the defeat, of justice. (See the judgment of Lord Esher M.R. and Bowen L.J. in *Western, &c. v. Perez, Triana & Co.*). Accordingly the Rule Committee addressed themselves to give clear expression to the very intention which Cotton L.J., in *Russell v. Cambefort*, said not only could

<sup>1</sup> O. 45, r. 10. 'Any other person' in O. 45, r. 1 shall include a firm, any member of which is within the jurisdiction, and a garnishee order may be made against any such firm in the name of the firm; and any appearance by any member then within the jurisdiction pursuant to any order made under this Rule shall be a sufficient appearance by the 'firm.' To appreciate the full significance of this rule, the whole of O. 45 should be read.

not be presumed in interpreting the then existing rules, but also (as I read his judgment) could not be expressed and enacted without infringement of international comity. With some diffidence, I proceed to give an account of what I conceive to be the novelties introduced by the repeals and new enactments of O. 48 a.

(a) A writ may be sued out against a partnership firm in the partnership name, provided the firm carries on business within the jurisdiction (not necessarily the same as having a place of business within the jurisdiction). It is immaterial whether any or all of the partners are outside the jurisdiction, and no leave is required. To give in a graphic way the effect of this change and its limits, it is enough to say that if *Russell v. Cambefort* were to happen again, the service, under the new rules, would be good service on the firm; if *Western, &c. v. Perez, Triana & Co.* could happen again, the service in that case would still be bad, for the writ under the circumstances would be improperly issued<sup>1</sup>.—It would also seem that, under the new rules, partners who do not carry on business within the jurisdiction must sue in their proper names.

(b) The service on a firm may be, as before, on any of the partners, or *per manager*, but it is expressly made clear that 'subject to these rules, such service shall be deemed good service upon the firm so sued, whether any of the members thereof are outside the jurisdiction or not.'

(c) Every person served is to be informed by a notice in writing to be served with the writ, whether he is served as partner or manager, or both. In default of such notice, the person served is to be deemed to be served as partner.

(d) A person served as manager is not to appear, unless he is also a member of the firm. This rule was probably inspired by some remarks of Lord Esher in *Western, &c. v. Perez, Triana & Co.*, '91 1 Q. B. at p. 310. A person served as partner may appear under protest instead of moving to set aside the service. See the above-mentioned case.

(e) Execution on a judgment or order against a firm may issue on 'any property of the partnership within the jurisdiction.' The last three words are new. It is hardly necessary to point out that the English Courts possess no executive machinery by which property outside the jurisdiction may be affected. The effect of the words in r. 8, 'But except as against,' &c., seems to be that

<sup>1</sup> It is worth noticing that the draftsmen of the new Rules seem to have been to some extent guided by the observations of Chitty J. in *Shepherd v. Hirsch, Pritchard & Co.* The difference seems to be that he contemplated the carrying on business at a fixed place within the jurisdiction as a necessary datum, and the draftsmen have been satisfied with not requiring the 'fixed place,' except as an indispensable condition to be fulfilled before service *per manager* can be effected.



a partner who had been outside the jurisdiction when a writ against the firm in the firm name had been issued, and had not been made a party under O. 11, or been served within the jurisdiction after the issue of the writ, would be unaffected by judgment against the firm save as to his interest in the partnership property. He would not be liable, as a partner within the jurisdiction at the time of the issue of the writ, but not individually served, would be liable, to execution on leave obtained from the court or a judge, nor could the court direct an issue to try his liability after judgment obtained against his firm, nor, if I understand the rule, would the judgment be a cause of action against him in this country (as in *Clark v. Cullen*, 9 Q. B. D. 355). I also think the intention of the draftsmen was to prevent, as far as in them lay, such a judgment from mediately affecting any non-partnership property he might have outside the jurisdiction, by dint of action brought upon it in a foreign court, or of registration under the Judgments Extension Act. But nothing would prevent a plaintiff from taking any additional independent proceedings against him in the same subject-matter, here or elsewhere, nor could he set up with success against such plaintiff a plea of *res judicata*, which would probably be open, in such proceedings (in England at least), to a partner within the jurisdiction at the time of the issue of the writ, and not personally served.

(f) The rule of 1888 enabled a garnishee order to be made on a firm, any member of which was resident within the jurisdiction, in the name of that firm. The mode of service or notice seems to have rested with the judge. (O. 45, r. 2.) An appearance by a member then within the jurisdiction was to be a sufficient appearance by the firm. O. 48 a, r. 9 provides that the firm must 'carry on business within the jurisdiction.' It seems unnecessary for any member to be within the jurisdiction, except when service *per manager* is impossible, owing to there being no place of business or no manager. An appearance by any member is to be sufficient appearance by the firm.

(g) A new rule (r. 10), relating to proceedings between a firm and one of its members, and between firms having common members, irrelevant to the main subject of this paper.

(h) All the old rules relating to quasi-firms having been repealed, O. 48 a, after ten rules relating to firms proper, ends with the following short rule (No. 11): 'Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply.'

It is to be regretted that the Rule Committee had not before their minds that caution of Horace,

‘Brevis esse laboro,  
Obscurus fio,’

a caution of greater practical importance in the draftsman's than in the poet's art. Thanks to the brevity of r. 11, the influence of *Russell v. Cambefort*, a case which raised the difficulty to the removal of which the new order was directed, and which overruled a decision as to service on a quasi-firm in the course of establishing the principles applicable to service on a firm, has been allowed to make a difference between the case of service on a firm, some or all the members of which are outside the jurisdiction, and a quasi-firm, the ‘sole trader’ being outside the jurisdiction.

Now, if the matter had been free from authority, I should have thought that the effect of r. 11 was fairly clear. It does not seem irrelevant, in considering what the new rule enacted, to consider also what it repealed. When, of the rules repealed, one reads O. 9, r. 6 with O. 9, r. 7, O. 12, r. 15 with O. 12, r. 16, and O. 16, r. 14 with O. 16, r. 15, and in addition reads the cases decided upon the old rules, one perceives that the effect of the old rules was, and it was never doubted, that so far as issue, service, and appearance went, the firm and the quasi-firm were exactly *in pari casu*. Before and after *Russell v. Cambefort*, and in the discussion in that case, they stood or fell together. No argument was ever, so far as I know, raised to attempt to prove that a difference must be made in construing the rules respectively applicable to a firm and a quasi-firm on the ground that judgment (on default of appearance) against a firm, ensuing on service *per manager*, could not, without more, be followed by any but a limited execution under O. 42, r. 10, while no such limitation was imposed in the case of judgment under similar circumstances against a quasi-firm<sup>1</sup>.

<sup>1</sup> Lest I should seem to have overlooked it, I refer to a case of *Burt v. Rose & Co.*, mentioned in the Annual Practice 1896, p. 888, as ‘decided by Practice Master, Feb. 21, 1889, confirmed by Mathew J. at Chambers.’ The matter alleged to be decided in this case, which was of course decided under the old rules, and of which I know no more than appears in the White Book, is that when a quasi-firm is served *per manager* (and, apparently, judgment signed in default of appearance), execution could not issue, under O. 42, r. 10, against the private goods of the sole trader, and that if such execution was desired, service must be effected on the sole trader personally, or an order applied for, under the latter part of the rule, for leave to issue execution against him. It is possible that the learned judge was impressed by the fact that, although, by O. 9, r. 7, service *per manager* on a sole trader, ostensibly a partnership firm, is to be ‘deemed good service on the person so sued,’ yet O. 12, r. 16 and O. 16, r. 15 speak of such an ostensible partnership as ‘a firm.’ Under the former of the two last-mentioned rules, and the common law rule that the judgment must follow the writ (see *Jackson v. Litchfield*, 8 Q. B. D. 474), judgment would seemingly be against the ‘firm.’ Then, proceeding to O. 42, r. 10, he might well be oppressed by the difficulty which this rule introduces. The rule begins, ‘Where a judgment or order is given against a firm, execution may issue:—

When, therefore, we find that these rules are repealed and a new Order is framed, written at large as to firms proper, and providing that, so far as firms carrying on business within the jurisdiction are concerned, the difficulty introduced by *Russell v. Cambefort* shall be removed, and ending with a rule relating to quasi-firms carrying on business within the jurisdiction, and shortly saying that 'so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply,' it seems fair to conclude that, so far, at all events, as issue, service, and appearance were concerned, the old analogy between firms and quasi-firms was to continue to exist.

The new rules, unless *Worcester, &c. Co. v. Firbank, Pauling & Co.* is wrongly decided, are wide enough to reach a firm of foreigners, personally outside the jurisdiction, but carrying on business by manager at a fixed place within the jurisdiction. *A priori*, we should expect foreign quasi-firms, carrying on business under like conditions, to be similarly affected, and I venture to think that it may be collected from r. 11 that the draftsmen intended to bring about this result. Any argument to the contrary based on the

(a) Against any property of the partnership.

(b) Against any person who has appeared in his own name under O. 12, r. 15, or who has admitted on the pleadings that he is, or who has been adjudged to be a partner.

(c) Against any person who has been served, as a partner, with a writ of summons, and has failed to appear.'

In the case of service *per manager* under O. 9, r. 7, and judgment signed, in default of appearance, against 'the firm,' how is execution on the judgment to be effected? It is clear that there is no 'property of the partnership,' *stricto sensu*, and (b) and (c) are under the circumstances manifestly inapplicable. If O. 42, r. 10 prescribes the mode of enforcing such a judgment, it is clear that, in such a case as that described, 'property of the partnership' must be read as 'property embarked in the particular trading venture conducted under the firm name,' unless justice were to be defeated, and the benefit of the judgment, as such, illusory. The drafting leaves something to be desired, but I think the better interpretation would have been to say that 'firm' in the opening words of O. 42, r. 10 must, taken in connexion with what follows, be understood as 'partnership firm,' and that service *per manager* on a quasi-firm being 'deemed to be good service on the person so sued,' judgment ensuing on such service, on default of appearance, must be taken to be a personal judgment, though in the quasi-firm name. If this is so, the ordinary consequences of a personal judgment would follow, and the absence of any special rule regulating execution in such a case would be explained by the fact that no such rule was necessary. If, however, the ground of decision in *Burt v. Ross & Co.* was the simple one that quasi-firms ought to be within the equity of the rule of limited execution on partnership firms, my comment is that this is legislation rather than interpretation. On the practical difficulty, in the case of a sole trader, of drawing the line between property embarked in a particular trading venture, and property not so embarked, it is needless to enlarge. It is much to be regretted that *Burt v. Ross & Co.* was not reported, and did not go to the Court of Appeal. It is also to be regretted that it was not cited to that court when *St. Gobain, &c. Co. v. Hoyermann's Agency*, '93, 2 Q. B. 96 was decided. That case, of course, was decided upon the new O. 48 a, r. 11; but the remarks of Lord Esher M. R. on p. 104, beginning 'If the construction of r. 11,' &c., show that if Mathew J. and the Practice Master were right in their interpretation of the old rules, the alteration of 1891 has worked a change in the liability of 'quasi-firms served *per manager*,' at which I venture to think the Rule Committee would be surprised.

difference between a firm and a quasi-firm in the consequences flowing from judgment on default of appearance, ensuing on service *per manager*, seems answered by a reference to the state of things under the old rules<sup>1</sup>. Unless service *per manager* on a quasi-firm has, under the new rules, ceased to be possible in any case,—and, notwithstanding certain passages in judgments presently to be noticed, I do not think any judge would come to this conclusion,—there seems no reason why a foreign quasi-firm, fulfilling certain conditions similar to those fulfilled by an English quasi-firm, should claim, *quoad* issue and service, any special tenderness of treatment denied to the English quasi-firm, now that foreign and English firms, trading at a fixed place in England, are, *quoad* those matters, ‘in the same boat.’

The first thing one notices is that r. 11 opens with the significant words, which come in the opening clause of r. 1, and are new in both,—‘any person carrying on business within the jurisdiction.’ If the last clause of r. 11 is to mean anything, it must mean this,—that the foregoing rules, which in terms apply to that particular group of persons, a partnership firm, must be applied to a quasi-firm by making the appropriate changes from plural into singular, and without neglecting the essential points of difference (recognized by the old rules) between a partnership and a sole trader, and the absolute inapplicability, *necessitate rei*, to a quasi-firm of certain directions relating to firms proper. Using this canon, r. 3 would be read into r. 11 in this way,—‘the writ shall be served upon the [sole trader] or at the principal place,’ &c. (so far, in the case of an English quasi-firm, the authorities seem to go), ‘and subject to these rules such service shall be deemed good service upon the [quasi-firm] so sued, whether the [sole trader] is out of the jurisdiction or not, and no leave to issue a writ against him shall be necessary;’ *scilicet*, a quasi-firm, which was under the old rules in a strictly similar position, *quoad* issue and service, to that of a firm, but, like a firm, was subject to the limitations of *Russell v. Cambefort*, continues, under the new rules, *quoad* those matters, in a strictly similar position to that of a firm, the limitations of *Russell v. Cambefort* having been removed or modified. The effect, however, of the decisions of the Court of Appeal on O. 48 a is that, while

<sup>1</sup> It is not suggested that the difference *quoad* execution existing, on my hypothesis, between the position of a member of a firm, outside the jurisdiction at the time of the proceedings, and not personally served, and that of a sole trader (quasi-firm) similarly situated, is precisely the same as it was under the old rules, as interpreted prior to *Russell v. Cambefort*, or that it exactly corresponds with the difference, under old and new rules alike, between the position of a member of a firm not personally served and a sole trader (quasi-firm), no question of jurisdiction arising. I am venturing to assume the incorrectness of *Burt v. Ross & Co.* The contention is simply that the proved existence of a difference of position, *quoad* execution, is no ground for denying similarity of position, *quoad* service.

a firm carrying on business within the jurisdiction may be well served *per manager*, notwithstanding that none of the partners are English, and all are out of the jurisdiction, the rule as to quasi-firms must be read as if the first clause contained the additional words 'if such person be within the jurisdiction.'

It seems a just observation, by way of preliminary to the criticism of the cases on O. 48, r. 11, to remark that there was some reluctance on the part of learned judges, until *Worcester, &c. Co. v. Firlank, Pauling & Co.* was decided, to give to the new rules relating to firms proper their true and natural meaning. The lessons of *Russell v. Cambefort* had been hard to learn—once learnt, it seemed difficult to fully grasp the fact that a new state of things had arisen in which those lessons had ceased to be relevant *in simili materia*. In *Grant v. Anderson*, '92, 1 Q. B. 108, Lord Coleridge C. J. and Wright J. seem to have been clearly of opinion that the new Order must still be read as subject to the principles of *Russell v. Cambefort*, even in the case of a firm proper. And I think that a careful study of the reports of *De Bernales v. New York Herald*, '93, 2 Q. B. 97 n, and *St. Gobain, Chauny, & Cirey Co. v. Hoyermann's Agency*, '93, 2 Q. B. 96 (decisions, presently to be noticed, on the position of quasi-firms), brings to light indications of the attitude which the learned Lords Justices who delivered judgment in those cases, would at that time have taken with regard to the position of firms proper under the new rules, though they formally withheld their opinions on that subject. It was in *Worcester, &c. Co. v. Firlank, Pauling & Co.* (March 7, 1894, Lord Esher M. R., Lopes and Davey L. JJ.) that the new Order, so far as it dealt with service on firms proper, underwent a lucid and satisfactory exposition, and due effect was given to its plain language<sup>1</sup>. I am inclined to suspect that if *St. Gobain, &c. Co. v. Hoyermann's Agency* had been later in time than *Worcester, &c. Co. v. Firlank, Pauling & Co.*, the decision in the former case might have been different, even while I have in mind the fact that the safeguards provided by the rule as to limited execution in the case of firms proper (the absence of which, in the case of quasi-firms, has had, as we shall see, so much importance attached to it) were duly considered and referred to in the latter case.

The case of *De Bernales v. New York Herald* is not, strictly

<sup>1</sup> I desire particularly to draw attention to the judgment of Lord Davey (then L. J.), as pointing out in the tersest and clearest way what was the true test in the cases from (and including) *Russell v. Cambefort* onwards, decided under the old Rules. This test,—residence or non-residence within the jurisdiction,—had been a good deal obscured by learned judges who had 'darkened counsel,' if I may respectfully say so, by dwelling on considerations connected with nationality, domicile, the Queen's dominions, submission to the power of Parliament, and the like.

speaking, an authority one way or the other on the subject of service on a quasi-firm, the sole trader being outside the jurisdiction, having regard to the ground on which the Court of Appeal disposed of it. It is a stage of an interesting litigation (see *De Bernales v. Bennett*, 10 Times L. R. 419), which illustrates the versatile ingenuity of the plaintiff's advisers in trying to bring a rather 'impossible' case within the English Rules of Court. The cause of action was an alleged libel in a New York newspaper, circulated in London, and owned by an American citizen resident in Paris, and an attempt was made to effect service, under O. 48 a, r. 11, upon the defendant, *per manager*, at the London office of the newspaper. Much of the case turns on matter concerned with substituted service, which we need not consider. Lopes L.J. (sitting with Lord Coleridge C. J., as a Divisional Court), in the course of a judgment, in which Lord Coleridge concurred, after reading r. 11, observed, 'I cannot think that the authors of this rule intended that service might be effected on an individual foreigner permanently residing abroad, simply because he carried on business in this country under an assumed name, when it could not have been effected upon him if he carried on business in his own name. The code of rules contained in O. 48 a are (*sic*) difficult to understand, but whatever their effect and meaning may be, I decline to put upon them a construction to my mind so unreasonable as this<sup>1</sup>.'

What magic, for that matter, is there in a firm name to bring foreign partners outside the jurisdiction within the reach of the court without the aid of O. 11? The Court of Appeal answered that question in *Worcester, &c. Co. v. Firbank, Pauling & Co.*—I take leave to doubt whether Lopes L. J. could have given that answer consistently with his reasoning in *De Bernales v. N. Y. Herald*.

In *St. Gobain, &c. Co. v. Hoyer mann's Agency*, a foreigner, resident in Hanover, carried on business in London at an office, on the door of which were the words 'Hoyer mann's Agency, Phosphatfabrick, Hanover.' The writ was against 'Hoyer mann's Agency,' and served *per manager*. Judgment was delivered, apparently immediately after the conclusion of the argument, at considerable length by Lord Esher M.R., and more shortly by A. L. Smith L.J. affirming a Divisional Court and a Judge in Chambers. It is impossible, for reasons of space, to minutely criticize these judgments, but I think

<sup>1</sup> It seems equally unreasonable that a resident Englishman trading in London should be in worse case by trading under an assumed name than by trading under his own. But, as a matter of fact, it is fairly clear that the effect of the new rules is that he, in the first case, being in Northumberland or Cornwall, might be served in London *per manager*, while in the second case he would have to be served personally. That this was the state of things under the old rules is, of course, beyond doubt.

a careful reading of them will convince a critic that Lord Esher and A. L. Smith L. J. were still under the influence of *Russell v. Cambesfort*, and did not notice that the question was not whether that case had or had not been overruled, but whether under the new rules it was or was not in point<sup>1</sup>. Both judgments, if I may respectfully say so, take it too much for granted that the new rules are 'similar' to the old; and both, as I have already said, seem to me to contain indications that the full effect of the new rules, even upon partnership firms, had not been grasped. Lord Esher, in particular, seems to ignore the consideration, plainly expressed in certain remarks of Chitty J. already referred to, and apparently held in mind by the Rule Committee, of the reasonableness, even from the point of view of one jealous for the maintenance of international comity, of foreigners, who elect to carry on business in England, being amenable, wherever personally situate, to process served at their place of business in England, when such process is connected with the affairs of that business. He bases his argument to a great extent on the inequality in the matter of execution in the respective cases of a foreign firm and a foreign quasi-firm. I have tried to point out that a similar argument applies to the case of a quasi-firm served *per manager*, the sole trader being in England, but has never prevailed to make service *per manager* on a quasi-firm in all cases nugatory. If I understand A. L. Smith L. J. rightly, the sole novelty which, to his mind, r. 11 was intended to introduce, was to make John Jones, trading as 'Madame Louise,' as much a quasi-firm as the same man trading as 'Jones & Co.' I venture to think that this is not exhaustive; and Lord Esher seems to me not altogether happy in his explanation of the words 'within the jurisdiction' in r. 11, by a reference to the old O. 9, r. 7, where those words occur, but in a different context.

In *McIver v. G. and J. Burns*, '95, 2 Ch. 630, 64 L. J. Ch. 681, the case turned on a rule of an Order of the Lancaster Palatine Court identical with O. 48 a, and repealing rules identical with those repealed by that Order. The plaintiffs and Sir J. Burns were partners; the articles were in Scottish form, and signed by Sir J. Burns in Scotland in his own name. Independently of the

<sup>1</sup> It is convenient here to notice that the 'darkening of counsel,' already referred to, which *Russell v. Cambesfort* did so much to encourage, continued after the introduction of the new rules. One cannot read the judgments of the Divisional Court in *Grant v. Anderson and De Bernales v. N. Y. Herald*, and of the Court of Appeal in the case under notice, without seeing that nationality or domicile, and not residence, is the matter to which the attention of the judges is principally directed. One sentence of Lord Esher's judgment in the *Hoyermann's Agency* case,—'If, therefore, he were an English subject,' &c., p. 101, line 5 from foot,—seems to imply that if Hoyermann had been English, the service would have been good, residence in Hanover notwithstanding.

partnership, he carried on business in Liverpool as 'G. & J. Burns,' himself residing and being domiciled in Scotland. The writ was for an account of the partnership and divers ancillary matters; it was, in form, against 'G. & J. Burns,' and was served *per manager* in Liverpool. Robinson V. C. held the service good, being led by the language of Lord Esher's judgment in *St. Gobain, &c. Co. v. Hoyer mann's Agency*, to make a distinction between a Scotsman and a foreigner *stricto sensu*. This was reversed by the Court of Appeal, Lindley L. J. referring (as reported in the Law Journal) to the last-mentioned case, and using arguments similar to those of Lord Esher, based on the impossibility of applying the rule of limited execution to such a case as that before him. He also said (and it is submitted that this is the true *ratio decidendi*) that the cause of action, in proceedings under r. 11, must be connected with the business of the quasi-firm. It was on this ground that Rigby L. J. seems to have based his judgment<sup>1</sup>.

Lopes L. J., while agreeing with Lindley L. J., seems to take a similar view of the intention and scope of r. 11 to that taken by A. L. Smith L. J. in *St. Gobain, &c. Co. v. Hoyer mann's Agency*, a view which I have already been bold enough to criticize as not sufficiently wide. Unless I misunderstand his judgment, he even goes farther than A. L. Smith L. J., and would make the rule apply only in the case of a 'fancy name' pure and simple.

I am well aware of the respect which is due to any judicial utterance of the Master of the Rolls and the learned Lords Justices who took part in the two cases last discussed. I yield to no one in my admiration of their learning and acuteness, and am conscious that a private lawyer, dissenting from their opinion, is far more likely to be wrong than right. But it may be that others, sharing my respect, will share my doubts as to the convincing nature of the arguments on which their judgments are based,—so far as they affirm the general proposition that a quasi-firm in England, having as principal a person (whether foreign or English) outside the

<sup>1</sup> This ground of decision opens up a question of some interest. The original O. 9, r. 6 had begun, 'Where partners are sued.' It was possibly due to the remarks of Watkin Williams J. in *Davis v. Morris*, 10 Q. B. D. 436, that in 1883 these words were altered to 'where persons are sued as partners,' making absolutely clear what might have been inferred from the opening words of O. 16, r. 10, 1875 (cf. R. S. C. 1883, O. 16, r. 14), 'Any two or more persons claiming or being liable as copartners may sue,' &c., viz. that the rule was only applicable when the partners were served as such. No corresponding change was ever made in the original rules relating to quasi-firms, and the question never seems to have arisen whether, under the old rules, A., trading as 'A. & Co.' might have been served *per manager* by a creditor, for instance, who had supplied him personally with food or clothing, but who was in no sense a business client of the quasi-firm. So far as I can judge, both Lindley and Rigby L. JJ. would have construed the old rules in the same way, and do not rely on the last clause of r. 11, assimilating quasi-firms, as far as may be, to firms proper, as introducing any novelty in this regard.



jurisdiction, is in a better position, *quoad* liability to service *per* manager, than a similar quasi-firm with a principal resident in the jurisdiction. The new Order, which was intended, I believe, to cure a serious inconvenience, failed to go as far as many would have liked,—for instance, to make a writ, in a business matter, capable of being served *per* manager, even in the case of a defendant trading in his own name,—it has, as construed by the Court of Appeal, prevented a firm carrying on business at a fixed place in England from evading service of a writ in the firm name by the easy stratagem of keeping a partner outside the jurisdiction. That a similar result might be effected in the case of a quasi-firm carrying on business at a fixed place in England was much to be desired, both for the protection of business creditors, and for the maintenance, in an extended field, of the simplicity and symmetry of the old practice which placed firms and quasi-firms *in pari casu quoad* service. In the interpretation of the new Order, various reasons have been put forward to justify the making of a difference between them. That some of these break down under examination, and that others seem, if pressed to their logical conclusion, to make service *per* manager on a quasi-firm in every case impossible,—which no one has ventured to suggest,—I have tried to show. Whether any litigant will be courageous enough to fight a case on all fours with the *Hoyermann's Agency* case up to the House of Lords, I do not know. It would be, however, very interesting to have the opinion of that tribunal upon the new rules, especially r. 11, and the influence of *Russell v. Cambefort* on the cases since 1891 might evoke some valuable critical remarks upon that decision, and the reasoning on which it was based.

T. K. NUTTALL.

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## CYPRUS LAW AND ITS ADMINISTRATION.

**B**Y the Convention of June 4, 1878, His Majesty the Sultan consented to assign the Island of Cyprus to be occupied and administered by England. On July 1, an annex to this convention was signed at Constantinople, one clause of which provides 'That a Mussulman Religious Tribunal (Mahkémé-i-Shérieh) shall continue to exist in the island which will take exclusive cognizance of religious matters, and of no others concerning the Mussulman population of the island.' There was no express proviso that in all other legal matters the English government should have full authority, but this has been assumed and acted on since the Occupation. From this date until November 30, 1882, the Turkish Courts remained in full vigour: there was a Davi Court in each of the principal towns of the island, and a Temysz Court sitting as a Court of Appeal in Nicosia.

The judges in these Courts were either Ottoman or Greek, but there was an English Judicial Commissioner attached to each Court, who reported to the Judicial Commissioner at Nicosia, if in his opinion the judgment was wrong, and the Judicial Commissioner at Nicosia having examined the matter, could set the judgment aside which had been pronounced.

On November 30, 1882, an Order in Council was passed which entirely altered the previous system. By this Order, first a Supreme Court of Civil and Criminal Appeal was created; the head of the Supreme Court is the Chief Justice who acts not only as such, but is together with the Queen's Advocate consulting adviser to the government in all legal matters.

The Chief Justice also issues from time to time circulars relating to the business of the Courts in the island.

The other member of the Supreme Court is called the Puisne Judge. The Order in Council contemplated having three judges, and as all the Courts below consist of *three* judges, and as a majority of the cases in the island depend more on matters of fact than matters of law, it is scarcely satisfactory that the decisions of *three* judges should be overruled by the decision of *two*. Until recently there were no reports of the decisions of the Supreme Court, but last year the leading cases which had been decided by it since the Occupation were collected and published in two volumes, and this year the Reports of the year 1894 have been published. From

these it appears that out of thirteen civil cases on Appeal 1894, in nine the appeal was successful, in three cases the judgment of the District Court was varied, and only in one case was the appeal dismissed. This shows that there is something wrong somewhere, or else the great difficulty which the courts have in administering the law according to the complicated system which prevails here. The Order in Council also provides for six District Courts in the six principal towns in the island, viz. Nicosia, Larnaca, Limassol, Famagusta, Kyrenia, and Papho. Each of these District Courts consists of three members. The President, who must be an Englishman, and two colleagues who are somewhat unhappily termed in the Order in Council 'ordinary judges.' One of these must be a Mussulman, the other a Greek. These courts have unlimited jurisdiction in civil matters subject only to a right of appeal in all cases regarding land, and in claims for money, if the amount in dispute is £20 and over: in the latter case leave to appeal may be given by the District Court itself, or by the Supreme Court. The President of the Court has many duties to perform, he is responsible for everything that is done in the Court; by virtue of his office he is also a magistrate; as such he determines summarily most criminal cases, for which the penalty is one month's imprisonment or £5 fine. He conducts most of the preliminary investigations in criminal cases which are sent to the Criminal District Court or to the Assize Court; he is called upon to act as village judge in civil cases which do not exceed £5, and as Revising Barrister for the revision of the list of voters for the Legislative Council. It is he alone who, by the Order in Council, must take the evidence of all proceedings; and although this is not expressly stated in the Order in Council, it has been held that he must take down in his own handwriting everything that occurs in civil and criminal cases; and he cannot delegate this duty to either of his colleagues or to any officer of the court. But his powers are not as great as his duties in all civil and criminal cases; if his two colleagues differ from him he is obliged to sign a judgment of which he disapproves. And although it is provided by the Order in Council that in cases where sentence has to be given, the President shall have an additional or casting vote, it is clearly evident that where there are *three* judges, this provision is perfectly nugatory. The duties of the ordinary judges are to act as colleagues of the President in civil and criminal cases, to do the main work of village judges, and especially what is termed 'to settle the issues.' Pleadings in Cyprus are not conducted between the parties, but before a judge; the parties appear, either personally or by an advocate, and state the facts upon which they rely. The judge

then decides what are the questions involved in the dispute, and upon them the trial is based. In my opinion this settlement of the issues might altogether be done away with. The writ of summons by which an action is begun clearly expresses the nature of the claim; and the work of the judge in settling the issues, while it involves great labour and time, does not materially assist the court. Each of the ordinary judges can sign a warrant for the apprehension of an offender, but both must be present to hear a criminal case. The officers of the court are, first, a Registrar, whose duty it is to supervise all matters incidental to legal proceedings, and also to act as interpreter to the court in all cases; he must have a perfect knowledge of the English, Turkish, and Greek languages: as a rule Armenians are employed as registrars. The registrar is assisted by a Turkish clerk, a Greek clerk, and by young men who are termed student clerks, and who help the Registrar without receiving any pay. The administration of justice does not cost much in Cyprus.

The President receives only £500 per annum, the ordinary judges have salaries ranging from £150 to £175 per annum; the registrars' salaries range from £110 to £130, but with fees; and the clerks from £36 to £60 per annum. Each District Court, besides its Civil, has also a Criminal Jurisdiction. This extends to imprisonment for three years, but an appeal lies to the Supreme Court in cases of conviction. In case of offences the punishment for which is more than three years, there is an Assize Court which has jurisdiction in all crimes for which the punishment is more than three years' imprisonment. The Assize Court consists of the following members: the Chief Justice, the Puisne Judge, the President of the Court, and his two colleagues. Assizes are held in each of the six towns, three times a year. In all cases the sentence for which is death, or imprisonment for fifteen years or over, the Chief Justice and the Puisne Judge must both be present, but in cases for which the penalty is less, one only of them is required to come. It seems to me a defect that the President of the Court, who almost always acts as Committing Magistrate, should be called upon to act as Judge of Assize. He would not commit as a rule unless his mind was made up as to the case, and very little additional evidence is ever adduced. This practice is supported on the ground that there is no trial by jury in Cyprus, and therefore it is held to be necessary that the court should be a numerous one. It seems to me that it would be better for the President of one District Court during assize time to interchange with another from a different district. The procedure in Civil and Criminal cases is practically the same as English procedure. It is very doubtful whether English

criminal procedure is adapted to the wants of this island ; especially is this the case with regard to evidence. Perjury is very prevalent in Cyprus. In the case of a witness to any crime the utmost pressure is invariably exercised over him by the friends and relatives of the accused person, and the result is that a person who has given evidence before the police, when he comes into Court before the magistrate, denies or weakens his evidence. An attempt has been made to remedy this evil by the False Evidence (Contradictory Statements) Law Amendment Law, 1893, which enacts in effect that a person who has made a sworn charge before the Magisterial Court, and then when examined as a witness before the Magisterial Court wilfully makes a statement contradictory to his former charge, shall be deemed guilty of giving false evidence ; but this law is of little practical value, since in the large majority of cases it is the police who swear the charge, and not a private person. A law passed the year before, the False Evidence Contradictory Statements Law, 1892, enacts in effect that if a witness on the trial of a person on information accused of a criminal offence wilfully make any statement contradictory to, or inconsistent with, what he stated as a witness in the Magisterial Court, he shall be deemed to have given false evidence. But this is also of very little practical value, because most of the contradictory statements are made by witnesses, not as between the Magisterial Court and the District or Assize Court, but between the statements made to the police and what they say on oath before the magistrate.

It would be desirable, in my opinion, to give the Local Commandant of Police, and the Inspector of Police, the power to take evidence on oath, and then to develop the law of 1892, by enacting that statements wilfully made before a magistrate in contradiction to those made by him to the police shall be deemed to be perjury. By the 'Cyprus Courts of Justice Order' a person cannot be convicted on the evidence of one witness unless corroborated by material facts. But by the Criminal Evidence Law, 1894, 'particulars of a statement made by a complainant are admissible on evidence, if such complaint was made immediately after the commission of the offence, and to the first person or persons to whom the person making such complaint or statement spoke after the commission of such offence, or to the person or persons to whom the court considers that it was natural that such a person would complain or make a statement regarding the offence.' The wisdom of this law seems doubtful. False charges are unfortunately very common in Cyprus, caused either by love, or revenge, and it is evident that a person who makes a false charge will immediately repeat it to the persons mentioned in the law with a view to strengthen his case.

Next, as to the Advocates of the Courts. At the time of the Occupation there were scarcely any persons qualified by their learning to act as advocates, and persons of good character were admitted to practice without enquiry as to their knowledge of the law. But by degrees persons who have studied at different foreign universities have joined the profession, and last year the Advocates Law, 1894, was passed, which, while maintaining the rights of advocates who had practised for eight consecutive years before the passing of the law, renders it compulsory for all others either to pass an examination or else to have a legal diploma. The advocate in Cyprus combines the duties of barrister and solicitor. The usual fee is from three shillings to £1 an appearance, but as a rule an advocate makes an agreement with his client for a certain sum, to be increased if the client gains his case; and he may, it appears, stipulate, that if his client is successful, he, the advocate, should be entitled to retain all costs adjudged to his client.

So far for the administration of the law, next for the law itself. The Law may be divided into two main kinds:—

A. The Ottoman Law.

B. The Law introduced since the English Occupation.

A. The Ottoman Law may be divided into four parts:—

First, the Medjellè, or Ottoman Civil Code.

Second, the Ottoman Land Law.

Third, the Ottoman Commercial Law, and Maritime Law.

Fourth, miscellaneous provisions contained in the Destour or Ottoman Code.

First, the Medjellè. This was compiled from the years 1869 to 1873, under the reign of his Majesty the Sultan Abdul Asiz. It has been translated into French and Modern Greek, but unfortunately not into English; but there is reason to believe that this defect will be shortly repaired. Previously to the compilation of the Medjellè, the Ottoman Civil Code was in a state of great disorder. There were four different schools of law, but the principal one was the Hanafite School, so called after the name of its founder Ebu Hanife. The law was made like Roman Law by means of Fetvas, which were the opinions of the jurisconsults on questions submitted to them. The opinions of the Hanafite School prevailed throughout the Ottoman Empire, and in the compilation of the Medjellè their opinions have been followed. A committee was appointed to compile the Medjellè, and they published their report on March 10, 1869. At that time they had only finished one book, the first book, concerning Sale. The whole work consists of sixteen books, published at intervals, without any logical sequence.

Book 2. treats of Hire. 3. Security. 4. Transfer of a Debt.

5. Pledge. 6. Deposit, and other things. 7. Gift. (These subjects may be roughly placed under the head of Contract.) 8. treats of Wrongful Appropriation, which therefore may be said to deal with Delicts or Torts. 10. treats of Ownership and Partnership, the two subjects not being carefully discriminated. 11. Deals with Agency and Mandates. 9. deals with certain miscellaneous matters, such as Interdiction, Effect of Force on Contracts, and the Right of Preemption in case of the Sale of Property.

The books may be said to deal with Substantive Law. The books from 11 to 16 treat mainly of Procedure and Evidence. Books 14 to 16 are not in use in Cyprus. Book 16 treats of the duties and requisites of a judge; and all I can say is, that if the Turkish judges throughout the empire exhibit the high qualifications that the Medjellè demand of them, there cannot be much reason to complain of Turkish justice.

The books of the Medjellè do not contain any general principles; instead of this in each contract is enumerated what is required for its validity. But they have a prologue which is termed the 'Fundamental Principles of the Sacred Law.' This prologue contains a hundred sentences taken from the Koran, which are to be applied when any difficulty arises in particular cases. Some of these are as follows:—

'Custom makes law.'

'That which has fallen cannot be replaced.'

'Every wrong must be made to disappear.'

'Wrong cannot be redressed by wrong.'

'Suspicion cannot destroy certainty.'

'If the principal falls, the accessory also falls.'

'Things unseen are judged according to their outward signs.'

The commission of the Medjellè says these sentences must be learned by heart by every judge and every government official, and will then serve as a guide in their judicial and practical work. A commentary on these articles exists in the Greek translation, and is valuable for reference, but has no authority. The great characteristic of the Medjellè is the examples which accompany each article: the majority of the subjects of the Ottoman Empire are illiterate, they cannot understand abstract rules of law, but they can understand rules submitted to them in concrete form, hence the value of these examples, which add greatly to the bulk of the volume, but greatly increase its usefulness. The cases as regards the Medjellè, which come most frequently before the Courts, relate to Rights of Land and Water, and Admission of a Debt.

In Cyprus the water supply is very deficient, consequently water is of great value, and is the subject of constant litigation.

A person can admit a debt either by word of mouth or by writing, and this admission is binding on him. He can make an admission by another person writing for him, but if so, he must either seal or sign it. There is one part of the Medjellè which throws great light upon Ottoman customs. No man can look out of his house on places where women sit or go, as for instance a kitchen, the mouth of a well, or a courtyard. A garden is not considered a place where women resort. In my own house there are windows so arranged that it is impossible to see what is going on in the neighbouring yard below.

Second. The Ottoman Land Code has been translated into English by Mr. F. Ongley, of the Cyprus Government Service. The characteristic of the Ottoman Land Law is that the greater part of the land cannot be held in full ownership, but only by paying taxes to the State. The transfer of land can only take place before a government official, and certain fees have to be paid therefor. To escape these fees the vendor very often does not register the property in the name of the buyer. It would have been wise for the Cyprus Courts to have laid down that an unregistered sale gave no rights to the purchaser, but they have adopted a middle course; they have held that the purchaser, as against the vendor, has a right to quiet enjoyment, and that after the period of prescription, which is either ten or fifteen years, according to the nature of the property, the purchaser obtains a good title. The purchaser in these cases cannot sue for his money back, and if the property passes into the possession of the State, he can neither get back his money nor his land.

There is a law making registration compulsory, but it has not been acted on in my experience.

Third, the law is the Ottoman Criminal Code, which has been translated into English. This code was published in 1858. The translator, Mr. Walpole, now Chief Justice of the Bahamas, says as follows: 'This law is partly a translation and partly an adaptation of the Code Pénal which bears the name of Napoleon.'

The Criminal Code is very complex and somewhat hard to administer. Instead of giving definition of crimes it begins with the most aggravated case of crime, and then works back to the simplest; e. g. in article 217 it says that persons guilty of larceny when all the five following circumstances occur must be punished with imprisonment from fifteen years to life. These circumstances are as follows: first, when committed in the night time; second, when committed by two or more persons; third, where the guilty parties, or one of them, have carried arms either openly or concealed; fourth, where the guilty parties have entered a house or its curti-



lage, a room or any other apartment occupied by men, climbing in, &c.; and fifth, where the offence has been accompanied by violence, or threats to make use of weapons; and after various articles we come finally to article 230, which deals with simple larceny.

It may be noticed that under Turkish Law unnatural offences are no crime unless committed upon a child of thirteen, or unless the person committing the offence is entrusted with the care or education of the injured person, or has control over him, or unless he is a hired servant. The Criminal Code has much increased by new laws passed since the Occupation.

Fourth, the code is the Ottoman Commercial and Maritime Codes. These are practically a translation from the French Commercial Code, and as such call for no remarks.

Fifth, there are sundry miscellaneous provisions contained in the *Destour* or Ottoman Code which sometimes but rarely come before the Courts.

B. The law made since the Occupation. This law owes its origin to the activity of the Legislative Council which was created by an Order in Council, November 30, 1882. It consists of the High Commissioner, who presides when present, six non-elective members who are office holders, and twelve elected members, three of whom are chosen by the Mohammedan and nine by the non-Mohammedan inhabitants of the island. The laws passed have been numerous, and to discover what they are a judge is obliged to ransack the annual volumes of the Cyprus Laws from 1883 to the present day, as no digest has ever been made of them. Each year produces new laws or amendments of old ones. They embrace Civil, Criminal, and Administrative matters.

From the foregoing it will be seen that the administration of justice in Cyprus is a very difficult matter, as the law consists of Ottoman Substantive Law added to, or amended by, the Legislative Council, coupled with a procedure almost entirely English.

The English government has made an attempt to put new wine into old bottles, and the attempt has not been without success. The inhabitants of Cyprus recognize the fact that they have a firm and impartial judicial system, and their great delight is to resort to the courts. The number of cases which come before the courts is remarkable.

In the District Court of Papho, the inhabitants of which district number about 30,000, there are about 700 civil cases and about 1,000 criminal cases dealt with each year. The courts practically always sit, for although the Civil Courts suspend work for seven weeks in the summer, the Magisterial Courts remain open all the year.

The only recognized holidays are Christmas, Good Friday, Easter Day (English and Greek) and the Queen's birthday, and one President cannot leave his work unless another is willing to come and take it. In my opinion the length of the judicial year is a mistake, it is not that a person is overworked on any given day, but the continued succession of days on which there is work more or less, tells both on the health and energy of the judges. There seems to me to be no reason why there should not be a Long Vacation in Cyprus as there is in England, especially when we consider that the thermometer in the shade averages over eighty degrees from June 1 till October 1.

In conclusion, I would say that if England is to retain the occupation of Cyprus, there is great need for a Cyprus Code which would collect into a systematized whole the various laws which now exist. If this were done, not only the knowledge of the law, but also its administration would be greatly facilitated.

W. E. GRIGSBY.

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## WYCLIF ON ENGLISH AND ROMAN LAW.

ANY passage in a mediaeval book which compares or contrasts the system of the civilians with our own English law should be treasured. Such a passage there is in Wyclif's *De officio regis*, a tract that was published by the Wyclif Society in 1887. The heresiarch is not a writer whose arguments are easily followed, for they are always taking unexpected turns, or at all events turns which will be unexpected by those who are not familiar (and I, for one, am not) with the theology and politics of the time. In this tract, for example, he is concerned to belittle the civilians. Apparently the quarrel that is really near his heart is the quarrel with the canonists. He wants to see a world and a church that have little law other than the law of God laid down in the Holy Scriptures, of which law neither civilians nor canonists but theologians are the custodians and interpreters. One of his reasons for praising, somewhat faintly, the law of England is that there is not very much of it.

‘Et hinc leges regni Anglie excellunt leges imperiales, cum sint pauce respectu earum, quia supra pauca principia relinquunt residuum epikerie sapientum <sup>1</sup>.’

English law has but few principles, and much is left to the *ἐπιείκεια* of the wise.

Wyclif, however, has a feud with the bishops who have been fostering the study of ‘the civil law’ in the universities. Thus they have been withdrawing men and means from theology. Of the two, the clergy of England had better read English than Roman law. But, says Wyclif, some will argue that there is more subtle reasoning and more justice in Roman civilianship (*civilitate Romana*); also that it must needs be studied if the canon law is to be understood; also that it is necessary for the decision of causes according to ‘the law of arms.’ Now it must be confessed that there is much of reason in this *civilitas Romana*. Also that it has produced great statesmen.

‘Sed non credo quod plus viget in Romana civilitate subtilitas rationis sive iusticia quam in civilitate Anglicana, et cum sit per se notum quod quecumque lingua, Latina, Greca vel alia, sit imperitins clerimonie vel rationi, cum ratio sit ante linguam, patet quod

<sup>1</sup> *De officio regis*, p. 56.

non potius est homo clericus sive philosophus in quantum est doctor civilitatis Romane quam in quantum est iusticiarius iuris Anglicani<sup>1</sup>.

This is an early assertion of the right of the common lawyer, the justice of the law of England, to take his place beside the doctors of the civil law as a clerk and philosopher, or, as we should say, a learned and a liberally educated man. Wyclif goes on to argue that the canon law in its purity (that is, the canon law as he would like to see it) can be studied without the aid of the civil law; also that the true 'law of arms' lies in the Bible.

Elsewhere he is arguing for the disendowment of the civilians and canonists at the universities:—

'Unde videtur quod si rex Anglie non permetteret canonistas vel civilistas ad hoc sustentari de suis elemosinis vel patrimonio crucifixi ut studeant tales leges (hoc enim non sustinet de lege propria cui rationabiliter plus faveret) non dubium quin clerus foret utilior sibi et ad ecclesiasticam promocionem humilior ex noticia civilitatis proprie quam ex noticia civilitatis duplicis aliene<sup>2</sup>.'

It would be better for the clergy to learn the civil system of their own country than the 'doubly alien' system of imperial and papal Rome. Still, he adds, something should be known of this foreign matter, in order that men may understand that in old times the pope was subject to the emperor. A historical study of the civil and canon law will teach them how baseless are the pretensions of modern popes.

In attacking the papalists Wyclif had been making common cause with the imperialists of the continent. But he seems to think it necessary that he should dissociate himself from them lest he should be taken to allow the emperor some superiority over the king of England. The imperial theory, the theory of a world-wide monarchy, is attractive and once was useful. But the emperors have forfeited their claims by their folly in endowing 'their bishop' (that is, the pope) contrary to Christ's religion and in allowing the clergy to usurp imperial rights. The empire no longer 'lives imperially as it ought to live.' So England will have none of it, nor of its laws. Therefore, once more, it is a scandal that our bishops should be licensing and encouraging the clergy to study the *ius civile*<sup>3</sup>, which in tracts that are addressed to the vulgar in the vulgar tongue becomes 'paynymes lawe' and 'hethene mennys lawe.'

There are not wanting some other signs that in the second half of the fourteenth century 'the civil law' (thanks to such legally-minded prelates as Bateman) was looking up in the world. Wyclif's

<sup>1</sup> De officio regis, p. 193.

<sup>2</sup> Ib., p. 237.

<sup>3</sup> Ib., p. 250.

*De officio regis* is ascribed by its editors to the year 1379 or thereabouts. A few years afterwards, in the case of the lords appellant, we hear the famous declaration of the peers that this realm never has been and shall not be governed by the civil law. They were at the moment engaged in setting up a 'law of parliament' (which, it is to be feared, meant law or lawlessness improvised for the purpose of vengeance) not only above the civil but above the common law<sup>1</sup>. However the mere fact that some one had proposed that 'appeals' in Parliament should be conducted according to the civil law, that is, according to the system of procedure which the civilians and canonists had jointly elaborated, shows that this procedure was gaining ground, and we know that it was becoming the procedure of the nascent court of equity. Wyclif's protest in favour of English law is therefore of some interest. He was quarrelling with the clergy and was concerned to keep the laity, including the king, nobles, and common lawyers on his side.

F. W. MAITLAND.

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<sup>1</sup> Rolls of Parliament, iii. 236, 244.

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We have received, too late to be mentioned in its proper context, an interesting paper entitled 'The Relation of the Law School to the University,' read by Mr. Ernest W. Huffcut, of Cornell University, at the annual meeting of the American Bar Association. It deals with questions of detail that would hardly arise here in the same form, but assumes as beyond question the necessity of some co-ordination and co-operation of academic and technical training.

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## REVIEWS AND NOTICES.

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[Short notices do not necessarily exclude fuller review hereafter.]

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*La Codification du droit international de la Faillite.* Par D. JOSEPHUS JITTA, Professeur à l'université d'Amsterdam. La Haye: Belinfante Frères. 1895. 8vo. 342 pp.

THE positive laws of all civilized States recognize that when a person becomes bankrupt he ceases to have power over his estate, and his creditors are entitled to have it sequestrated and divided among them according to their respective rights and preferences. But as to the mode in which such sequestration and division shall take place, and as to the effect of the bankruptcy upon the status of the bankrupt, there is great diversity of system. In other words, there is a conflict of laws in bankruptcy, and unhappily this conflict gives rise to great inconvenience and expense in commercial transactions, for which there is little remedy in the existing state of private international law. A foreigner resident in England has assets and debts here as well as abroad, or, vice versâ, an Englishman resident in a country not subject to English law has assets and debts there as well as at home. By what law shall his estate be administered for behoof of his creditors and distributed among them? Is it the law of his domicile, or the law of his native State, or the *lex loci rei sitæ*? Or must there be several bankrupt processes in different countries where assets or creditors may be found? Again, suppose a bankrupt has received a discharge in bankruptcy—ought that discharge to receive universal recognition and the bankrupt's certificate be admitted everywhere as a defence to an action by a creditor? Again, in the competition of creditors, where the bankrupt has foreign property or foreign creditors, by what law shall it be determined whether a particular creditor is entitled to a preference, or whether a security that a particular creditor has received is objectionable as a fraudulent preference? These and similar questions occur almost daily, and give rise to difficulties as great as any that exist in the whole field of jurisprudence.

Though on the solution of some of these questions a certain degree of accord exists, at least among the leading modern States, there is much contrariety of practice regarding others, and the only hope apparently of obtaining a satisfactory result is by united action on the part of the respective Governments.

It is with a view to a discussion and solution of the problem arising out of the conflicts of bankruptcy laws that the small treatise of Professor Jitta, now before us, has been prepared. It deserves attentive perusal. The author is thoroughly acquainted with his subject, and has evidently made a study of the English rules of bankruptcy as well as those of France, Germany, Italy, and other Continental systems. The problem of private international law of bankruptcy is stated as follows (p. 8): '*le droit international de la faillite a pour but de régler pour la société universelle*

du genre humain ce que les lois nationales sur la faillite règlent pour la société nationale, c'est-à-dire la manière dont il faut appliquer, en cas de faillite, le principe que tous les biens du débiteur sont le gage commun de ses créanciers, sauf les causes légitimes de préférence.'

With regard to the general question whether a process of bankruptcy should have effect upon the totality of the bankrupt's property wherever situated, or whether it should operate merely as a sequestration of property within the territory, M. Jitta strongly supports the principle of universality. He also discards the notion, which holds its ground in our own and American legislation, of a distinction between real and personal property in the matter of vesting. On the question what should be the normal basis of jurisdiction in bankruptcy, M. Jitta rejects the principle of nationality as impracticable, and suggests that in lieu of domicile the expression 'centre de la vie active' should be applied in every case. 'L'expression que nous employons,' he says, 'a l'avantage de combiner les éléments du domicile et de l'établissement principal, et de donner en même temps un élément décisif lorsque le domicile d'un débiteur et son principal établissement ne sont pas dans le même lieu' (p. 53).

It is recognized in recent discussions that there are two methods of terminating international conflicts of laws, viz. (1) by way of uniform legislation and (2) by way of treaty. We observe that the 'Institut de droit International' has expressed the opinion that uniformity of legislation is specially desirable in regard to bills of exchange, carriage, and the principal parts of Maritime Law, and that other parts of Commercial Law should be regulated by treaty (see *Tableau de l'Institut*, p. 52). M. Jitta arrives at the conclusion that the international law of bankruptcy should be so far codified, in the first place as a progressive step, by way of separate legislation on the part of the various States, but that to make such codification ultimately complete it must be supplemented by international treaty. Further, it is the author's view that each State should proceed to such legislation independently, without waiting for action on the part of other States—'le devoir s'impose à l'État, pris isolément, indépendamment de ce que peuvent faire les autres États. Un État n'a pas à venger sur les particuliers les injustices que les autres États peuvent commettre. Toute politique de représailles dans la sphère du droit privé est indigne d'un pays civilisé' (p. 287).

The volume has no index, but a most exhaustive table of contents makes the absence of an index practically unimportant. There are also appended two *avant-projets*—the first containing (in 63 articles) provisions of international law appropriate for enactment by each State as part of its national law; the second containing (in 48 articles) provisions appropriate for an international treaty constituting *une union judiciaire en matière de faillite*.

H. G.

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*Company Precedents.* By F. B. PALMER, assisted by C. MACNAGHTEN and A. J. CHITTY. Sixth Edition. Part I. London: Stevens & Sons, Lim. 1895. La. 8vo. lxxvi and 1143 pp. (36s.)

To estimate the value of Mr. Palmer's book we have only to picture to ourselves what would be the condition of company promoters, directors, vendors, syndicates, and other such persons without it. Pitiably indeed! Here the crooked places are made straight and the rough places plain.

Sound practical advice based on the firm ground of authority is given in the introductions, and with it forms adapted to all the varied vicissitudes of a company's career from the cradle to the grave; nay, beyond it, for some thirty pages are given to reconstructions. But the value of the book is too well recognized, both in the profession and out of it, to need any recommendation. The present edition contains much new and valuable matter; *inter alia*, the law relating to bankers' securities—an increasingly important topic—is very fully dealt with; so is underwriting—a commercial practice which may be expected to receive a fresh impulse from the recent sanction given to 'brokerage' by the Court of Appeal in *Metropolitan Coal Consumers' Association v. Scrimgeour*. Finally, Mr. Palmer has some very pertinent remarks to make on the decision in *Broderip v. Salomon* and the judicial views there enunciated. The private company is Mr. Palmer's peculiar protégé, and he naturally resents the bar sinister which the Court of Appeal have affixed to it.

It would be difficult to name any law-book which has been more successful—and deservedly successful—than these Company Precedents of Mr. Palmer. The flowing tide of company enterprise floated him into popularity, and Mr. Palmer knew how to take advantage of it. It is by the care which he has bestowed on every successive edition, and by his ready adaptation of his forms to the growing wants of the commercial world—not by any mere good luck—that he has maintained and maintains his prestige as a company lawyer.

E. M.

*The Relationship of Landlord and Tenant.* By EDGAR FOA. Second Edition. London: Stevens & Haynes. 1895. Roy. 8vo. cxv and 765 pp.

FOUR years have elapsed since the publication of the first edition of this work, whose utility has been now well tested by experience, and the numerous decisions on the law of Landlord and Tenant, which have been reported during that time, make a second edition most acceptable to the profession. The principles as to the measure of damages in the case of breaches of covenants to repair, laid down in recent cases, of which *Joyner v. Weeks*, '91, 2 Q. B. 31 is the most important, have been incorporated in the text, and special pains have been bestowed in elaborating the excellent chapter on the covenant to pay rates, taxes, and assessments.

The gist of the recent case of *Lister v. Lane*, '93, 2 Q. B. 212, is on p. 176 stated in the words of Lord Esher, that 'if a tenant takes a house which is of such a kind that by its own *inherent nature* it will in course of time fall into a particular condition of disrepair, such an effect is not within the covenant.' From the facts of the case however, and the judgment of Kay L.J., it seems these words only apply where there is something essentially *faulty or defective* from the first. Otherwise repair would be limited to making good the effects of voluntary or permissive waste. We refer in detail to the case as we know some difficulty has been occasioned in construing its exact effect.

Almost every question, old or new, on the law of Landlord and Tenant, is worked out in Mr. Foa's book with care and with considerable originality. The system of arrangement is logical, and the method of treatment clear.

There appears to be no branch of the subject that one cannot turn to with facility and find treated, though concisely, yet with accuracy and exactness. The special merit of the work, as compared with others, seems to us to be



its excellence on all questions of practice or procedure, and its value is in this respect considerably enhanced by its copious and well-arranged index, and its full tables of cases and statutes cited. No precedents are appended to the work, but many forms, especially of indorsements on writs, are suggested in the text, and special care is shown in treating of any steps which may be taken in the early stages of litigation.

The present new edition is a distinct gain to legal literature.

S. H. L.

*The Law of Property, including its Nature, Origin, and History.* By REGINALD A. NELSON. Madras: Srinivasa, Varadachari & Co. London: Sweet & Maxwell, Lim. 1895. 8vo. xiii, 494, and xxxi pp.

THIS book appears to be intended for Indian students preparing for examinations, and the author has not attempted more than a summary of accepted text-books. In the historical part of the work our old friend the Mark occupies a prominent place; at p. 94, for example, the Court Baron is described as 'the successor of the ancient assembly of the Village or Mark'—an assembly of whose existence there is really no evidence. Even if there was such an assembly it is certain that the manorial court does not represent it. Mr. Nelson has taken considerable pains with his summary of the existing law, and his references to Anglo-Indian legislation possess some interest for the English reader. His book will not lead the student very far astray, but it abounds in statements which, if not inaccurate, are somewhat oddly expressed. It may, for instance, be correct to speak of a will as a conveyance, but to say that it takes effect 'at the death of the conveyancer' is not in accordance with usage; the statement may even cause unfounded alarm in Lincoln's Inn. At p. 119 the statute abolishing military tenures is wrongly dated. Permissive waste ought not, we think, to be called 'involuntary' waste; and the plural of *fideicommissum* is not *fideicommissae*.

T. R.

*A General View of the Law of Property.* By JAMES ANDREW STRAHAN, assisted by JAMES SINCLAIR BAXTER. London: Stevens & Sons, Lim. 1895. 8vo. xix and 352 pp. (12s. 6d.)

To combine the law of real and that of personal property in one treatise, and to condense the whole into a book of the size of that before us, is no small achievement. The work as a whole is clear, accurate, and, within its compass, complete, though perhaps rather too sketchy in parts to wholly fulfil its purpose. Its scope is the law of real property and that of choses in possession. Choses in action are not included among things which can be the subject of property, but on the ground that they are in a secondary sense proprietary in their nature, a chapter is devoted to their consideration. Thus the work is lightened of the most bulky and difficult part of the law of personal property, and what is left is easily wedged in between sections of the law of real property. We say wedged in, for though a valiant attempt is made to reconcile the laws of personal and real property, and to treat them as one in principle, we have substantially a book on real property with occasional chapters on personalty.

The difficulty of attempting to treat of real and personal property on a common basis arises from the fact that in the theory of the common law

the two are fundamentally different. The basis of real property is tenure, not ownership. The latter is a conception almost unknown to the common law: and even as regards personal property, the idea of ownership is not well defined, since the common law strictly concerns itself rather with the right to possession. Yet ownership is here made the common starting-point of the law of property. Thus we begin with a false conception, which is with difficulty maintained in the portion of the book dealing with real estates.

The most striking feature of the work is the extent to which it is analytical rather than historical. Beginning with the largest conception of ownership, the authors show how in modern English law this, in the cases of both real and personal property, is carved out into various interests or estates, legal and equitable. Every kind of proprietary right is treated as a portion of the ownership, and these portions are classified and described according to their quality from that point of view. For example: 'when an interest is held for another or others, it is said to be held in *trust ownership*; when held with another or others, in *concurrent ownership*; when held after another or others, in *future ownership*; and when held subject to a proviso in favour of another or others, in *conditional ownership*.' An unfortunate result of this method of treatment is the necessity of inventing a new (and not accurate) terminology—such as the phrases 'trust ownership' (i.e. the legal estate), 'ownership in common' (i.e. tenancy in common), and 'future ownership in equity,' none of which we like as well as their old equivalents.

It is probably impossible to devise a wholly logical system which shall yet follow the old lines sufficiently for practical purposes; but we fail to see why leasehold interests in land are included among 'Kinds of Interests in things owned,' whilst the hire of a chattel finds its place along with easements and rights of common among 'Rights over things owned by others.'

The best-known older text-books on real property are primarily historical in their method. Thus Williams explained the nature of the various interests by showing how each grew out of the estate for life, and by developing by stages the modifications of the common law effected by equity and legislation. And we are not sure that this is not a better way than the analytical method of presenting the law to beginners. There is a danger in these times that the realms of law and equity may be confused in the mind of a lawyer, and that the fundamental differences between realty and personalty may be overlooked or forgotten. The very fact that these distinctions are less apparent than formerly makes it the more important that they should be clearly emphasized, exaggerated rather than minimised, in order to be understood and remembered. We do not imply that the authors have been unmindful of these distinctions, but we fear that their method may lead to want of appreciation of their importance on the part of the student.

In reading the book we marked a few matters of detail with which we cannot quite agree. In the introductory chapter it is stated that there can be no ownership of air and water. The authority of Blackstone might be given for this statement, but we do not think that it is good law. Water in pipes may be the subject of larceny at common law (*Ferrens v. O'Brien*, 11 Q. B. D. 21). Compressed air is now an article of merchandise, and we should be surprised if it were held that it could not be the subject of larceny or conversion just as coal-gas may be (*Reg. v. White*, Dears. 203). *Quære* whether wrongfully deflating a pneumatic tyre without injury to the tube could be held to be more than a civil trespass. On the subject of bailments, *Coupé Co. v. Maddick*, ([1891] 2 Q. B. 413) should have been referred to. It virtually overrules (whether rightly or not) the dictum in *Coggs v. Bernard*

that the liability of a bailee for hire is founded on negligence. In connexion with the Statute of Merton, the Law of Commons Amendment Act, 1893, might well have been noted; and in several cases inaccuracies have crept in by attempts to paraphrase statutory enactments (see pp. 66, 71, and 84). But whilst we criticize freely we do not condemn; and we feel justified in describing this suggestive work as a valuable contribution to the study of the law.

*The Universities of Europe in the Middle Ages.* By HASTINGS RASHDALL. Two Vols. Oxford: at the Clarendon Press. 1895. 8vo. Vol. I. xxvi and 562 pp. Vol. II. xiii, xiv and 832 pp. (45s.)

MR. RASHDALL's important work on the Universities of Europe in the Middle Ages necessarily deals with many subjects which lie beyond the scope of a legal periodical. But lawyers who concern themselves with the history of their profession will be interested in his remarks on the place held by law, and on the organization of legal studies in the mediaeval Universities. It will surprise many Englishmen to know that the rapid multiplication of Universities in the fourteenth and fifteenth centuries was largely due to the demand for highly educated lawyers and administrators. 'Law was the leading faculty in by far the greater number of mediaeval Universities . . . one of the most important results of the Universities was the creation, or at least the enormously increased power and importance of the lawyer class' (Vol. II. p. 708). For the study of law, especially of a great extant body of law, the mediaeval mind was, in Mr. Rashdall's opinion, peculiarly well fitted. This is probably true if we confine the remark to what may be called the dialectical study of law, the syllogistic development of principles. For the historical study of law mediaeval scholars had neither the inclination nor the materials. Mr. Rashdall does not think that the Church was animated by any general spirit of hostility to the civil law. The celebrated bull of Honorius III, which forbade the study of the civil law in the University of Paris, he regards not as part of a scheme for the suppression of legal study, but as an attempt to save one school of theology, and that the most renowned, from the encroachments of a more lucrative and popular study.

In Italy, especially in Bologna, one of Mr. Rashdall's three typical Universities, the predominance of law had a singular effect upon the academic constitution. The students who repaired to Bologna to listen to the teachers of the civil law were mostly men of good social standing and of mature years. Many were laymen and many were beneficed clergymen. The traditional discipline of the school and of the cloister was therefore inapplicable. The teachers were originally not officers of a public institution, but unofficial persons, 'whom a number of independent gentlemen, of all ages between seventeen and forty, had hired to instruct them' (p. 151). Hence the democratic self-government of the students of Bologna, which cannot be paralleled even in our own democratic age. The students had their *universitates* and the doctors had their *collegia*, but it was the *universitates*, not the *collegia*, which gained the upper hand and became the true governing bodies. The city of Bologna supported the doctors, but the pope supported the students, and the students excluded the jurisdiction of the city itself. The law faculty was also virtually independent of the other faculties. 'In ancient Bologna there was absolutely no constitutional connexion between the Faculty of Law on the one hand and that of Arts and Medicine on the other, except the fact that the student of each faculty obtained their degrees from the same Chancellor, the Archdeacon of Bologna'

(Vol. I. p. 233). Indeed the Faculty of Law, having been the first to attain to organization and self-government, seems to have claimed jurisdiction over their members. We wish that we had space to quote from Mr. Rashdall's interesting account of the course of legal study at Bologna and of the vicissitudes of the school, whose work 'represents the most brilliant achievement of the intellect of mediaeval Europe' (p. 254). But we must conclude with noticing a small inaccuracy. Mr. Rashdall's language (Vol. I. p. 100) implies that the Breviarium of Alaric II, the *Lex Romana Visigothorum*, is of later date than the compilations of Justinian. But Alaric II was slain in the battle of Poitiers in the year 506, whilst Justinian did not become emperor until the year 527. The Breviarium must therefore be of earlier date than the Code or the Pandects.

*The Revised Reports.* Vols. I-XXI (1785-1820). Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. London: Sweet & Maxwell, Lim. Boston, Mass.: Boston Book Co. 1891-1895. La. 8vo. (25s. each vol.)

THE twenty-first volume of the Revised Reports has been published, and has carried the revision, which starts from the year 1785, down to the reported cases of 1819 to 1820. It has been said not unfrequently that the old reports were better, that is, more concisely and accurately done, than modern ones are, but an examination of this series of reproductions will, we think, convince the reader that this is not the case, and that, so far as the inclusion of unnecessary matter is concerned, many of the well-known old reports compare unfavourably with the law reports of to-day; and, just as in statute law, the 'Statutes of Practical Utility' have clearly demonstrated the usefulness of revision, so also a revision of the earlier case-law, much of which is obsolete, is a movement in a practical and necessarily useful direction.

If it is necessary to support our remarks as to the comparative superiority of the present law reports, we would refer for instances to the remarks on Brown's Parliamentary Cases and Cox's Reports on page xii of Vol. I of this series, and it is also in point for equity lawyers to note the remarks of Vice-Chancellor Leach in *Hurst v. Beach*, which appear on page 307 of Vol. XXI; and, for further information, Wallace on the Reporters, fourth edition, 511, may be consulted. The series commences with the reports of Cox and Vesey and the Term Reports, Douglas's Reports and Brown's Chancery Reports not being included, for reasons which are stated on page vii of Vol. I, and it is intended to be an edition and not a selection of the reports revised. The system adopted is tersely stated in the Preface to Vol. I as follows: 'The decisions will be treated not as plaintiffs having to make out the merits of their claim, but as defendants with the benefit of possession.' No case therefore appears to have been rejected without careful scrutiny, and doubtful cases, that is, cases the usefulness of retaining which is only doubtful, have been retained. As an example of this, see the case of *Fitzroy v. Guillim*, Vol. I, page 167, and the note in the addendum to that volume. Several omitted cases have been restored, on further consideration, at the request of learned correspondents (see Preface to Vol. XXI).

In the result, the number of volumes to be issued would appear likely to be in excess of the number, fifty, at which it was originally anticipated that they would stop; but this appears to us, if a fault in any sense, a fault on the right side, and a kind of guarantee for the completeness of the work.

Among many instances of practically useful and instructive notes we may cite the notes on the cases of *White v. Boulton* (Vol. III), *Morley v. Gaisford* (in the same volume), and *Clowes v. Higginson* (Vol. XII). Further instances of careful research and lucid explanation are the notes on *Lickbarrow v. Mason* (Vol. I), *Kennedy v. Lee* (Vol. XVII), and *Irons v. Smallpiece* (Vol. XXI). The list of judges, with their dates, at the beginning of each volume is likely to prove useful.

[I have never before published a review of any work in which I was myself concerned, but so much of the work done on the Revised Reports is due to my learned colleagues that I feel bound, in justice to them, to make this exception.—F. P.]

*The Law relating to Income Tax, with the Statutes, Forms and decided Cases in England, Scotland, and Ireland.* By ARTHUR ROBINSON. London: Stevens & Sons, Lim. 1895. La. 8vo. xlix and 504 pp. (21s.)

THIS is a formidable book upon a formidable subject. It is clearly written, and upon the whole clearly arranged. When Somerset House itself says that of all the taxes under its control there is none which can compare with the Income Tax in respect of the difficult questions which arise in its administration, the existence of an elaborate treatise upon the subject is fully justified. Mr. Robinson's work is done for lawyers. Laymen will not go beyond the shilling manuals and guides. But on both sides of Fleet Street this book will be found useful. Our readers will be done the best service if we indicate what they will find in it. There are four parts, the first dealing with a small and unimportant subject the creation of officials, the second with the procedure generally applicable, the third with the paramount schedules granting the existing Property Tax, and the fourth with the small and important subject of 'the persons to be charged.' Add to this notes stating succinctly the effect of decided cases throughout the United Kingdom—the Scottish cases are particularly useful—and an exhaustive index, and Mr. Robinson may certainly be credited with the compilation of a very complete and—so far as we have tested it—accurate work. He has not of course written in the popular and attractive style of Mr. Sydney Buxton's *History of Finance*. But the introduction, in which he traces the history of the Income Tax, is well written and very readable. Many are still disappointed that Mr. Gladstone had not his own way with the Income Tax in 1874: then there would have been no yellow and unpleasant paper for us to receive every year, and there would have been no maze of Income Tax Acts for lawyers to thread with doubting steps. How Mr. Gladstone meant to abolish the tax we shall probably never know, even if an equally favourable opportunity ever recurs. As it is, each of us in his own measure is condemned to study as intricate and difficult a subject as there is in all the realm of law. To find one's way in the Act of 1842 is a hard thing. And we are not sure that with Mr. Robinson's rearrangement of the sections it is any easier. He has, however, reproduced the Acts *verbatim* in an appendix. In our judgment Mr. Robinson has brought out a serviceable and a trustworthy book, which deserves to succeed.

*The Acts relating to the Income Tax.* By STEPHEN DOWELL. Fourth Edition. London: Butterworth & Co. 1895. 8vo. lxxxviii and 448 pp. (12s. 6d.)

It is monstrous that the law relating to Income Tax should remain in its

present state of chaos. The law is contained in sixty-three Acts, beginning with the Income Tax, 1842, and ending with the Finance Act, 1895. And for a complete exposition of the subject it is needful to cite twenty-five other Acts. Till we have a Consolidation Act, books like the one before us cannot fail to be useful. The author has made a collection of all the relevant enactments, arranged in order of date, and has added excellent notes, containing cross-references and citations of reported cases. These seem to be more complete than those of former editions. A new and valuable feature of this edition is a short history of direct taxation, in which are sketched the various kinds of taxes imposed on property, from the Danegeld down to the regular establishment of Income Tax in 1842.

From the point of view of the Inland Revenue expert, this book is probably all that can be desired, but we are not all experts, and the ordinary lawyer sighs for more guidance through the intricacies and confusion of the statutes. The notes, good as they are of their kind, do not greatly conduce to a right understanding of the general principles and methods of the law. In some cases they are even calculated to mislead the unwary, as when *London Bank of Mexico v. Aphorpe* and *San Paulo (Brazilian) Railway Co. v. Carter*, are cited as cases on residence in sec. 2 of the Act of 1853, whereas, as we think, they are really cases explaining the scope of the first and fifth cases in sec. 100 of the Act of 1842, distinguishing possessions in foreign countries from profits made abroad by trades carried on in this country.

Another small matter for comment—a matter to which attention has often before been called in these pages—is the method of citing the Law Reports. The author indulges in such clumsy, and possibly misleading, citations as ‘Law Rep. C. A. 21 Q. B. D. 444,’ ‘[1895] C. A. 1 Q. B. 673,’ instead of the recognized and more convenient abbreviations.

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*The Law relating to Building Societies.* By EDWARD ALBERT WURTZBURG. Third Edition. London: Stevens & Sons, Lim. 1895. xix and 487 pp. (15s.)

WHEN an edition of a text-book only lasts for three years, it is evident that the book fulfils a need. Mr. Wurtzburg's book requires little at our hands, having assured to it more substantial support than we can give. We cannot turn over its pages without a thought of ‘the pity ‘tis’ that so elaborate a work be needed upon a subject which appeals in the main to the uneducated or partially educated classes, the ‘industrious’ classes as the Act of 1836 oddly calls them. If ever there was a province of law which ought to be popular and easily understood, it is that of building societies. Who among the unlearned grasps the essential distinction between societies incorporated under the Act of 1874 and its successors on the one hand and societies unincorporated under the Acts of William IV on the other? Between societies permanent and societies terminating? Between members advanced and members unadvanced or investing? And these things are the very *ABC* of building society law. This, however, is the misfortune of the matter and no fault of Mr. Wurtzburg. Indeed, we have no more fault to find with Mr. Wurtzburg's third edition than we had with his first and second. The book in our hands is abundantly justified by the new Act of 1894 and the new set of regulations which are now in force, and are to be found not only set out *in extenso*, but also referred to in the appropriate places. We repeat that as a guide—and a bulky guide is undeniably needed

in the maze of building society law—there can be no better hand to take than that which Mr. Wuitzburg holds out.

*The French Law of Marriage, Marriage Contracts and Divorce, &c.* By E. KELLY. Second Edition. Revised and enlarged by OLIVER E. BODDINGTON. In one Vol. London: Stevens & Sons, Lim. 1895. 8vo. xvi and 280 pp. (21s.)

THE editor has considerable qualifications for the task which he has performed; he is an English barrister, a member of the Federal Bar, and is Licencié en droit de la Faculté de Paris. The principal subjects discussed in this book are (1) the conditions precedent to the celebration of the marriage, (2) the validity of the marriage of French citizens abroad, (3) the marriage of American citizens or English subjects in France, (4) some of the consequences of marriage under French law, (5) property affected by marriage, (6) effect of domicile on property relations, (7) effect of marriage on nationality, (8) separation and divorce, (9) a comparison of the French and English marriage law. The book also contains copious extracts from the portions of the French Civil Code bearing on marriage, marriage contracts, and divorce, with a translation and an appendix of forms. We congratulate Mr. Boddington on the manner in which he has accomplished his task; we consider that his book will be extremely useful to those persons who contemplate marriage with a French subject. The law of France both as to the validity and the effect of marriage is so different from our own that it prepares some very unpleasant surprises for Englishmen whose daughters marry Frenchmen. Would any Englishman think it possible that a man who marries, and ill-treats his wife and squanders her fortune, has a right by law to be maintained by her father? Yet this is the law of France, see p. 73. We ought to add that there is a complete index.

We have also received:—

*Text-book of Forensic Medicine and Toxicology.* By ARTHUR P. LUFF, M.D. Two vols. London: Longmans, Green & Co. 8vo. Vol. I, xii and 416 pp.: Vol. II, viii and 360 pp. (24s.) This work will not, and is not intended to, displace Taylor's Treatise on Medical Jurisprudence. But it is a book of great interest and may be consulted with profit by legal as well as by medical practitioners. Especial praise is due to Dr. Luff for the prominence which he has assigned to toxicology, a science which, as appears from the recent report of Dr. Collis Barry, chemical analyst to the Government of Bombay, is steadily acquiring, in large parts of the empire, enormous practical importance. Two criticisms may be suggested. Dr. Luff rather underestimates the degree to which *Macnaghten's* case in its old, unlovely literalness still governs in criminal courts the question of the responsibility of the insane; and he has a bad habit of citing cases without any adequate marks for identification.

A. WOOD RENTON.

*Principles of the English Law of Contract.* By Sir W. R. ANSON, Bart. Eighth Edition. Oxford: at the Clarendon Press. 1895. 8vo. xxxv and 379 pp. (10s. 6d.)—Anson on Contracts is past the stage of being criticized. In this edition there is not much change to note: but in the section on agreements in restraint of trade Sir William Anson has taken the bold line (probably the wisest in an elementary book) of treating the *Maxim-Nordensfelt Co.'s* case, '94, A. C. 535, as now the sole and sufficient leading

case on the principles of the subject. This is very different from the old-fashioned editorial method of huddling new cases of the first importance into the end of an overgrown note. Reported decisions down to last July have been worked into the text.

*The Law and Practice relating to letters patent for Inventions.* By THOMAS TERRELL, Q.C. Third Edition. Revised by W. P. RYLANDS. London: Sweet & Maxwell, Lim. 1895. 8vo. xlv and 605 pp. (25s.)—A treatise on the law of patents which reaches a third edition is to a large extent beyond the range of criticism. This work would not suffer greatly, however, if that salutary rule were in its case set aside. Mr. Terrell's original treatise was a clear, accurate, and not too bulky exposition of the patent law. These qualities have been preserved by Mr. Rylands in the new edition—which has been thoroughly brought up to date. We are not sure, however, that the editor has fully recognized how much 'judicial legislation' has been effected—chiefly by Lord Herschell, Lord Watson, and Lord Justice Lindley—in regard to patents in recent years.

*The Origin and History of Contract in Roman Law.* (Yorke Prize Essay, 1893.) By W. W. BUCKLER. London: C. J. Clay & Sons. 1895. 8vo. xi and 228 pp. (3s. 6d.)—Mr. Buckler's prize essay makes a neat and scholarly book, and English-speaking students of Roman law will find in it a great many profitable things which were not to be found in any English book before. All or almost all the modern literature of importance appears to have been consulted, though the preference of German books and periodicals is perhaps a little too exclusive. We should like Mr. Buckler to reconsider his rather summary dismissal of the idea that *noxum* involved a pledge by the debtor of his own person. Comparison of early Germanic law would show that the idea is at all events neither fanciful nor inappropriate to a rude stage of society.

*Der staatsbürgerliche Unterricht.* Rede zur Feier des Geburtstages S. M. des Kaisers am 27. Januar 1893. Von Dr. FELIX STÖRK. Freiburg i. B. u. Leipzig, 1893.—In this address, delivered in the University of Greifswald, Prof. Störk deals with the evils incident to the widening of the gulf between 'Volksrecht' and 'Juristenrecht.' He seems to look for a remedy rather to improved political education of citizens at large than to any formal improvement in the law. Not enough lawyers nor laymen are yet sufficiently educated in this country to appreciate the problem: most of the former are content to know law by rule of thumb (and therefore often wrong, at the client's expense), most of the latter to regard it as a hopeless mystery.

*Report of the Committee on Law Reporting of the American Bar Association, 1895.* New York: *The American Lawyer.* 1895. 8vo. 16 pp.—Any British lawyer who happens to see this document may learn to bless himself for living in a country where we do not yet know what the evils of overmuch reporting can be. But it may well happen that, necessity being the mother of invention, and invention not lacking in America, the next generation will see a more complete solution arrived at in America—notwithstanding the formidable difficulties arising from the number of independent jurisdictions—than here.

*The Lawyer's Companion and Diary for 1896.* Edited by E. LAYMAN. London: Stevens & Sons, Lim.; Shaw & Sons. 1896. 8vo. 199 and 646 pp. (5s.)—This is the fiftieth annual issue of 'The Lawyer's Companion.' Each



year marks an increase in bulk of fifteen to twenty pages, and what the size of the book will be in time no man can say. The lists of counsel and of town and country solicitors are together responsible for an increase of some six pages since the issue of 1895, which, by a rough calculation, seems to show a net accession to the profession within the year of something like 300 members.

The book contains a list of the statutes passed in 1895, and the other miscellaneous information appears to be posted up to date.

*The Law's Lumber Room.* By FRANCIS WATT. London: John Lane. 1895. 12mo. 139 pp. (3s. 6d.)—This little book consists of a number of articles reprinted, with some corrections and additions, from the *National Observer*. There are a dozen chapters in all, dealing with such diverse subjects (among others) as *Peine forte et dure*, the custom of the Manor, the Press Gang (which, as Mr. Watt points out, is 'still a legal possibility'), and Trial by Battle (cf. Pollock and Maitland, *History of English Law*, ii. 630, where a short account of the procedure in Appeals of Felony and Writs of Right is given). It is not exactly true that the 'Par Nobile Fratrum' John Doe and Richard Roe were abolished by the Common Law Procedure Act. They lingered down to the date of the Judicature Act in the words, 'Issues of every of them are 40s. Each of them is attached by his pledges John Doe and Richard Roe,' which were visible in certain forms of the Common Law Courts—if indeed they do not linger still.

The book is likely to be of interest to both lawyers and laymen. One misprint we have noticed. The name of the learned author of *Trial by Combat* is Neilson—not Nelson, as printed on p. 107.

*Reports of Commercial Cases*, with an Introduction, explaining the Procedure adopted in Chambers and at the Trial. Edited by THEOBALD MATHEW. Reported by the Editor and MALCOLM MACNAGHTEN. Part I. March–August, 1895. London: Times Office and Butterworth & Co. 1895. La. 8vo. 16, x and 154 pp. (5s.)—These reports are intended for men of business as well as for lawyers, and therefore do not confine themselves to what is reputable from the strictly professional point of view. Like the report of patent and registration cases, they provide for special needs outside the normal requirements of the subscriber to any of the regular series of reports. The introduction is short, but should be carefully considered by every one who is interested in the reform of procedure.

*The Magistrate's Annual Practice for 1895.* By C. M. ATKINSON. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1895. 8vo. lxxvi and 897 pp. (15s.)—If all acting magistrates were wise they would all possess and study this book. Even the most cursory inspection of its various contents will show that for want of such study a magistrate, even if he has wisdom enough for all common purposes of life, is likely sooner or later to go wrong.

*Chronological Table of Public General Acts in force.* By PAUL STRICKLAND. London: William Clowes & Sons, Lim. 1895. 82 pp. (3s.)—This little book will not, and is not intended to, supersede the chronological table prefixed to the Index to the Statutes, but it will be found useful to the practitioner for many purposes.

*Negligence in Law*, being the Second Edition of Principles of the Law of Negligence. Re-arranged and re-written by THOMAS BEVEN. Two Vols. London: Stevens & Haynes. 1895. La. 8vo. cxc, x and 1779 pp.

*Ruling Cases.* Arranged, annotated and edited by R. CAMPBELL. With American Notes by IRVING BROWNE. Vol. V, Bill of Sale—Conflict of Laws. London: Stevens & Sons, Lim. Boston, U.S.A.: Boston Book Company. 1895. La. 8vo. xxxi and 975 pp. (25s.)

*A Treatise on the construction of the Statute of Frauds.* By CAUSTEN BROWNE. Fifth Edition by JAMES A. BAILEY, jr., with the co-operation of the Author. Boston, Mass.: Little, Brown & Co. 1895. La. 8vo. cxxv and 687 pp.

*Law of Naturalization in the United States of America and of other Countries.* By PRENTISS WEBSTER. Boston, Mass.: Little, Brown & Co. 1895. La. 8vo. xx and 403 pp.

*A Digest of Anglo-Muhammadian Law.* By Sir R. K. WILSON, Bart. London: W. Thacker & Co. Calcutta: Thacker, Spink & Co. 1895. 8vo. xxxii and 500 pp.

*The Law of Parent and Child, Guardian and Ward.* By R. STORRY DEANS. London: Reeves & Turner. 1895. 8vo. xvi and 166 pp.

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*The Editor cannot undertake the return or safe custody of MSS.  
sent to him without previous communication.*

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# THE LAW QUARTERLY REVIEW.

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## NOTES.

*SAN Paulo Railway Co. v. Carter*, '96, A. C. 31, 65 L. J. Q. B. 161 finally establishes that where a company residing in the United Kingdom there carries on a trade, the whole of the gains accruing to the company, even though they be the result of transactions (e.g. sales) taking place in a foreign country, are assessable to income tax.

The principle of this case at bottom is that where a company or an individual resides in the United Kingdom, and thence directs the whole of a trade or business, the trade or business is in effect carried on in the United Kingdom, even though the dealings from which gain is made take place in a foreign country, and that therefore the whole profits of the business are chargeable with income tax.

On careful consideration of the Income Tax Acts, it will be found that two principles govern the liability under schedule (D) of the annual profits of a trade or business to income tax.

The first is that all profits are liable to income tax which arise from the carrying on of a trade or business in the United Kingdom.

The second is that all profits are liable to income tax which, though they arise from a business wholly carried on abroad, are remitted to and received by a person resident in the United Kingdom.

The practical result may be thus stated :

1. *X*, whether a company or an individual, resides in the United Kingdom, and thence directs and carries on a trade or business. All the profits of such trade are liable to income tax, even though they arise from transactions (e.g. sales) taking place out of the United Kingdom, and even though they are not transmitted to or received by *X* in the United Kingdom (*San Paulo Railway Co. v. Carter*, '96, A. C. 31, 65 L. J. Q. B. 161; *Imperial Continental Gas Co. v. Nicholson*, 1 Ex. D. 428).

2. *X*, a foreigner, resides in a foreign country, and thence directs and carries on a trade or business. Part of the gains of such trade

or business arise from transactions, (e.g. sales) taking place in the United Kingdom. Such gains are assessable to income tax (*Pommery v. Apthorpe*, 56 L. J. Q. B. D. 155; *Werle v. Colquhoun*, 20 Q. B. Div. 753; *Erichsen v. Last*, 8 Q. B. Div. 414; *Grainger v. Gough*, '95, 1 Q. B. (C. A.) 71).

3. *X* resides in the United Kingdom. Profits accrue to him from a trade or business not carried on or directed by himself, but carried on wholly in a foreign country. Half such profits are remitted to and received by him in the United Kingdom. This half of the profits is chargeable with income tax (see *Colquhoun v. Brooks*, 14 App. Cas. 493).

What is particularly to be noted is that whilst the whole of the profits arising from a business directed, and in that sense carried on by a person who resides in the United Kingdom are chargeable with income tax, even though they result from transactions taking place in a foreign country, the profits arising from a business directed, and in that sense carried on or exercised by a person residing in a foreign country, if they are the result e.g. of sales taking place in the United Kingdom, are also assessable to income tax. To take a concrete case, an English brewer living in England, and thence directing his business, is taxed on profits made by the sale of beer in France; but a French wine merchant living in France and thence directing his business, is also taxed on profits made by the sale of champagne in England. The brewer is looked upon as carrying on the whole of his business in the country where he resides. The wine merchant, though residing in France, is looked upon as exercising or carrying on part of his business in England.

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Last year we ventured to doubt whether the decisions of the Court of Appeal which had overruled *Labouchere v. Dawson*, L. R. 13 Eq. 322, would be supported when *Trego v. Hunt*, '95, 1 Ch. 462, 64 L. J. Ch. 392, came before the House of Lords. The House has now ('96, A. C. 7, 65 L. J. Ch. 1) reversed the decision of the Court of Appeal and restored the rule, which is certainly more in accordance with natural justice and the convenience of business, that a vendor of goodwill, though free to compete with the purchaser, may not so far derogate from his own grant as to canvass the old customers personally. We have only to regret, as some at least of the Lords of Appeal did, that it was too late to lay down a still broader rule.

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*X & Co.* take into their employment a manager to whom they are to pay a salary of £4,000 a year, with liberty to commute the same on paying a gross sum calculated in the way specified in the

agreement. The company pay to their manager the gross sum of £55,000, calculated in accordance with the agreement, and dismiss him from their service. *X & Co.* then claim to deduct the £55,000 from the profits assessable to income tax. The claim of the company is not, in the opinion of the Court of Appeal, maintainable. This is the effect of *Watson v. The Royal Insurance Co.*, '96, 1 Q. B. 41 (C. A.), 65 L. J. Q. B. 132. Some of our readers will, it may be expected, fancy that the Court of Appeal has made a mistake. It seems at first sight a paradox that whilst the salary paid to *X & Co.*'s manager could certainly be deducted from *X & Co.*'s assessable profits, the sum paid in commutation of the salary due to him cannot be deducted. Yet the decision of the Court of Appeal is, we conceive, right. That this is so will be apparent to any one who will keep in mind the following two facts which are constantly forgotten by persons wishing to escape payment of income tax.

1. The sums which under schedule (D) are assessable as the annual profits of a trade or business would often not be treated as profits either by a trader or by an economist. The plain truth is, that under the Income Tax Acts the gross receipts accruing to any one from a business are, subject only to certain definite deductions allowed in the Income Tax Acts, assessable to income tax, and that in calculating a person's profits for the purpose of assessment no deduction can be made which is not expressly allowed by the Income Tax Acts.

2. Under 5 & 6 Vict. c. 35, s. 100, sched. (D), cases 1 & 2, r. 1, a tradesman may deduct from his taxable profits deductions which are 'wholly and exclusively laid out and expended for the purposes of [his] trade,' or in other words, he may deduct sums expended wholly for the purpose of earning the profits which are the subject of the tax, but may not deduct other expenditure.

Now the annual salary paid by *X & Co.* to their manager was a payment made for the purpose of earning their profits, and therefore was not assessable to income tax, but the lump sum of £55,000 paid for the purpose of dismissing him from their service was not a sum expended for the purpose of earning profits, and therefore was chargeable with income tax.

*Watson v. The Royal Insurance Co.* suggests a question which the case does not appear precisely to decide. Let us suppose that *X & Co.* employed a manager *A*, and instead of paying him £4,000 a year, paid him a lump sum of £55,000 down in consideration that he should, without any further payment, serve the company for say ten years. Could they deduct the £55,000, or any part thereof, from the annual profits assessable to income tax? It could

not, on the one hand, be disputed that the sum was equivalent to a yearly payment, and that if it had not been paid to the manager the company must have paid to him, or some one else, an annual salary which would have been deductible from their assessable profits. But on the other hand, it is hard to maintain that any part of the £55,000 could be treated as money laid out and expended for the purpose of earning the annual profit. On the whole, *Watson v. The Royal Insurance Co.* certainly suggests that a lump sum paid in lieu of annual payments can, under no circumstances, be deducted under schedule (D) from the assessable profits of a business.

Servants of the Crown, civil as well as military, except in special cases where it is otherwise provided by law, hold their offices only during the pleasure of the Crown.

This is the broad principle of constitutional law which is laid down with great clearness in *Dunn v. The Queen*, '96, 1 Q. B. (C. A.) 116 and *Mitchell v. The Queen*, *ibid.* 121.

These cases suggest at least three observations.

1. It is curious that the Courts should be called upon at this time of day to reaffirm a principle the existence of which is proved by the whole course of English history. The legal steps by which the independence of the Bench has been secured are in themselves sufficient proof that *prima facie* a servant of the Crown, be he a Secretary of State, a military officer, or a consul, holds office during the pleasure of the Crown, and therefore can at any moment be dismissed by the Crown.

2. The maintenance of the authority of the Crown to dismiss any official is absolutely necessary in order to secure the efficiency of the public service.

3. The prerogatives of the Crown tend more and more, as has often been pointed out, to become the privileges of the House of Commons. A minister in command of a large and obedient majority might, without breach of law, so exercise the Crown's power of dismissal as to import from the United States into England the disastrous maxim 'to the victors belong the spoil.' The virtual independence secured to the civil, and even to the military servants of the country, as long as they loyally discharge their duties, is guarded by public opinion rather than by law. It is therefore of the highest importance that opinion should on this matter be kept as sound as it is in the main at the present moment. *Dunn v. The Queen* will do good service if it impresses on all thoughtful persons the fact that we must trust to opinion and not to law for preserving the independence of the servants of the Crown.

*T* dies domiciled in England in 1892, possessed of large personal estate, consisting (*inter alia*) of £400,000 invested in mortgages of land in New Zealand. *T* has by his will bequeathed to his wife one-fourth of his personal estate. His wife, who survives *T*, leaves such one-fourth of *T*'s personal estate to her executors upon trust for sale and conversion. On her death in 1893 her executors claim that, in estimating the value of her personal estate for purposes of probate duty, they have a right to exclude from her one-fourth share of *T*'s personal property the whole of the New Zealand mortgage securities. It is held by the Queen's Bench Division that the executors have a right to make such deduction: *Attorney-General v. Sudeley*, '95, 2 Q. B. 526. It is held by the Court of Appeal, *dissentiente* Lord Esher, that the executors have not a right to make the deduction, and that the whole of the one-fourth share of *T*'s personal estate is liable to probate duty: *Attorney-General v. Sudeley*, '96, 1 Q. B. 354 (C. A.).

With regard to this case the following points should be noted:

1. The judges of the Queen's Bench Division and all the judges of the Court of Appeal agree that no property is liable to probate duty which at the time of the death of the owner is not situate in England.

2. They further apparently agree in holding that money invested on mortgages of real estate in New Zealand is to be looked upon as personal property situate in New Zealand.

3. The difference between the judges of the Queen's Bench Division and the Master of the Rolls, on the one hand, and the majority of the Court of Appeal on the other, lies in the different view which they take of the nature of the property possessed by *T*'s wife at her death. According to the judges of the Queen's Bench Division and Lord Esher, she was possessed of part of the mortgage securities in New Zealand, or, in other words, a share in property situate in New Zealand, which, because it was situate in New Zealand, was not liable to probate duty. According to the majority of the Court of Appeal, she did not possess any part of the mortgage securities; her property consisted in effect of the right to receive from *T*'s executors one-fourth part of his personal property when collected or got in by them. Whether such property originally consisted of money in England or securities in New Zealand is, from this point of view, a matter of indifference; the wife's personal property must be looked upon as a claim to be paid money due to her from *T*'s executors, or, in other words, as a debt due to her from English debtors, and therefore liable on her death to probate duty.

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In *Smith v. S. E. R. Co.*, '96, 1 Q. B. 178, C. A., we have a level crossing case, the first now for a considerable time. An attempt to show that rather ambiguous facts should have been withdrawn from the jury failed, as it deserved to fail. There was some incidental discussion of the question whether the plaintiff in an action for negligence is bound to prove in the first instance that he was free from contributory negligence. Our own opinion is that this doctrine is an American heresy due to the mischievous statutory (sometimes even constitutional) rule by which, in many States, the Court is forbidden to express any opinion to the jury on questions of fact. This has caused advocates to spend infinite pains and subtilty on trying to make the Court lay down as propositions of law what are really inferences of fact, so as to furnish grounds for an appeal. It is rather like the mediaeval history of special pleading over again. Here we have no occasion for these refinements. Kay L. J. (at p. 189) regards the question as still open, but inclines to the better opinion, as we humbly conceive it to be, that 'a party is not ordinarily bound to prove a negative,' i. e. the absence of negligence on his own part. Of course this may be put no less plausibly as an affirmative, that he was exercising due care. But we doubt whether the question is really open at all after Lord Watson's judgment in *Wakelin's case* (12 App. Ca. at p. 47).

It is said that *Gas Float Whitton*, No. 2 ([1896] P. 42), is to be appealed. The Court of Appeal, reversing the Divisional Court, has decided that salvors of a gas buoy or floating beacon, picked up adrift in the estuary of the Humber, have no right to salvage, upon the ground that salvage is payable only in respect of ships or their cargoes. If the case goes to the House of Lords, one question to be considered will be whether the right to salvage is anything more or less than a modification of the ancient law of the Admiralty as to 'findalls.' By that law, the finder of anything picked up at sea without an apparent owner was entitled to half 'halvendele' of his findall, and the Admiral was entitled to his 'shyre,' namely, the other half. This was the law of the Admiralty for centuries, and is referred to by Lord Stowell, when discussing the quantum of salvage to be awarded in the case of derelict. The right of the finder or salvor stands upon precisely the same footing as the right of the Crown; and the theory that Admiralty droits belong wholly to the Crown is a fiction of modern times. As to what was and what was not a findall, the records of the Admiralty show that besides ships and things that presumably came out of ships, a feather-bed, a table, fishing nets, oyster 'swadds' (baskets), royal fish, and anchor buoys have been presented at Admiralty Sessions and

dealt with as findalls, the finder taking one half and the Admiral the other; and the records will be searched in vain for any scrap of evidence that a salvor has ever been deprived of his halvendele because his findall was not a ship or part of a ship or of her cargo. Dead men's clothes and valuables did, indeed, belong wholly to the Crown, or to the Admiral its grantee, for the good of the dead man's soul; but even then the finder was allowed a recompense if he buried the corpse. This ancient right of the finder of goods at sea has been strangely whittled away and lost sight of, whilst the right of the Crown has been as steadily preserved and magnified. So much so that when, in recent times, Admiralty droits were transferred to the Consolidated Fund, the right of the salvor was altogether ignored, and it was deemed necessary to reserve a power for the Crown to grant him a reward. It may be that the old law of findalls is obsolete; if so, it would seem to be obsolete only so far as the modern law of salvage has taken its place. The right of a salvor of something that was not a findall, and that was not legal wreck, to claim against the property salvaged or its owner, is, like the rule against perpetuities and the married woman's separate use, an invention of the judges, and is not older than the end of the sixteenth or beginning of the seventeenth century. Before that time, Admirals and Vice-Admirals enjoyed the chief part of whatever profit was to be got from salvaging other people's property, the actual salvors being employed to do the work and paid by them for work and labour. When, in the time of Sir Henry Marten, judge of the Admiralty in the early part of the seventeenth century, salvors established their right to sue in Admiralty for salvage, the innovation was resented by the Vice-Admirals as diminishing their emoluments.

The decision in the *Gas Float* case as it stands will not encourage tug owners and watermen to exert themselves in picking up lighters adrift in the Thames, where, in weather such as we had last winter, they frequently part their moorings, and unless promptly secured may do great mischief. The ancient and laudable industry of sweeping for anchors has already been almost killed by the cutting down of salvage and the claims of receivers of wreck, the work being no longer remunerative.

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'I protest,' says Lord Esher, 'against being asked, upon some new discovery as to the law of innkeeper's lien, to disturb a well-known and very large business carried on in this country for centuries' (*Robins v. Gray*, '95, 2 Q. B. (C. A.) 501, 503, 65 L. J. Q. B. 44). These words are the introduction to an admirable judgment which places, or rather keeps, the law as to an innkeeper's

lien upon a clear and intelligible basis. He has a lien upon all goods which a traveller brings to the inn as luggage, and which the innkeeper is therefore bound to receive in his inn. His privileges and his liabilities are exactly correlative.

Lord Esher's protest, further, has a very wide application. It is in substance a salutary warning against all attempts to cut down a well-known rule of common law by the introduction of exceptions founded on subtle refinements. It may or may not be desirable that an innkeeper should have a lien on the luggage brought by his guests. Whether he should possess the lien is a fair question for Parliament. What is clearly undesirable is that his rights should be uncertain. Reformers or innovators need to be constantly reminded that one great quality of a good rule of law is its clearness and its breadth.

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*British Wagon Co. v. Gray*, '96, 1 Q. B. 35, 65 L. J. Q. B. 75 (C. A.) precisely marks the limits of the principle, which is often misunderstood, that in a civil case a defendant can give a Court jurisdiction by submission thereto. *X*, domiciled in Scotland, enters into a contract with *A*, under which it is agreed that in an action for the breach of the contract *X* may be served with a writ in Scotland. *X* breaks the contract, and the judge refuses to allow service in Scotland on *X*. The Court of Appeal holds that service could not be allowed, and the Court of Appeal is clearly right. Under Order XI, r. 1 (e), the Court is, in effect, forbidden to allow service in an action for breach of contract on a defendant domiciled in Scotland, and no agreement between individuals can empower the Court to do an act which it is by rules made under a statute forbidden to do. To look at the same thing from another point of view, the service of an English writ in Scotland is, under certain circumstances, forbidden on grounds of public policy, and no contract between *X* and *A* can make it politic or lawful.

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*Hardaker v. Idle District Council*, '96, 1 Q. B. 335, C. A., enforces the principle that both natural persons and corporations, when they are under a duty to the public to perform something with proper skill and care, cannot avoid any part of that duty by delegating it to a contractor, whatever care may have been taken to find a contractor who was competent. The fact that the contractor was not a servant is as irrelevant as it would be on the question whether an express contract had been fulfilled or not. The development of the law in this class of cases within a generation (see *Indermaur v. Dames*, L. R. 2 C. P. 311) has certainly been

remarkable, but we believe it is generally accepted as just and sound.

In *Exchange Telegraph Co. v. Gregory & Co.*, '96, 1 Q. B. 147, the Court of Appeal went rather near to holding, and apparently the Master of the Rolls would have held if necessary, that there is a right of property in exclusive and unpublished information apart from the form in which it is expressed. Careful attention to the facts and judgments will show, however, that this was not decided. The same case shows that the damage which is the gist of an action for maliciously procuring breach of contract need not be proved in detail. It is enough if the facts proved show that actual and substantial damage is a natural result. This is perhaps a step in advance; in any case it makes for justice and good faith.

A mortgagee has a great many rights, but even a mortgagee may put his rights too high, and the plaintiff in *In re Bell, Jeffery v. Sales* ('96, 1 Ch. 1, 65 L. J. Ch. 188, C. A.) did so: for being mortgagee for £400 only upon a fund of £1,000 vested in trustees he wanted the whole. The words expressly are, he argued like Shylock, an 'assignment.' I claim an assignment of the whole fund and I will administer it. The trustees had notice of subsequent incumbrances, and as stakeholders they naturally declined to hand it over, and the Court held they were right. The ingenuous reader of the Law Reports wonders how a case like this—the traditional ass's shadow—comes into Court; but the mystery melts away when we remember that administering a fund is a profitable industry. The true contest is which side shall have—the milking of the cow.

Once upon a time a gentleman promised to marry a lady on his father's death, and then in despite of his promise married another lady while his father was still alive. The forsaken fair one elected for instant reparation in damages. The gentleman thereupon—inspired by the special pleader—pleaded that she must wait till his father's death; he, the promisor, might then be a widower; peradventure he might have himself crossed the Styx: but the Court of Exchequer Chamber held that the just and convenient course was to fix the damages at once: they would only be aggravated by waiting (*Frost v. Knight*, L. R. 7 Ex. 111), and this view was followed in *Roper v. Johnson* (L. R. 8 C. P. 167). In the recent case of *Roth & Co. v. Taysen, Townsend & Co.* (1 Comm. Cas. 240, since affirmed (C. A.) 12 Times L. R. 211), Mathew J. has held that if a buyer repudiates before the time for delivery the seller ought, if he treats the repudiation as a breach, at once to

take reasonable steps to mitigate the loss by going into the market, and damages must be assessed on that footing. This case is a good instance of the wisdom of the rule, for the loss at the date of repudiation would have been £680 only, at the date of delivery it was £3,807. Curiously the same point has lately come before Vaughan Williams J. in *In re South African Trust & Finance Co.* (not yet reported), where an option to take shares was given by a company which went into voluntary liquidation, with a view to reconstruction, before the option became exercisable. Vaughan Williams J. fully recognized the obligation not to sit still and let damages accumulate, but thought it would be too much to require the option holder to go into the market and enter into a speculative contract for shares.

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[A specially learned contributor sends the following note, with which, it will be seen, we cannot wholly agree.]

'This case is a very remarkable one.' From this dictum of Gorell Barnes J. no one will dissent. The gist of the case is thus summed up by his lordship: 'The petitioner's case is, "I never intended to marry this man; I thought I was being betrothed to him"—certainly it is remarkable that a person of any education should have thought such a thing, but I can only judge by her manner—"and I submitted to be betrothed only because my mother and he forced me to do so."' The petitioner in *Ford v. Stier*, '96, P. 1, from a report of which these words are taken, was at the time of the alleged marriage seventeen years of age, and of full intellectual capacity; the marriage was celebrated in accordance with the forms of the Church of England in St. Mary Abbott's, Kensington. It took place in 1889, and the petitioner took no step to have it declared a nullity till she had gone through a second marriage with Mr. Ford, and till about, apparently, five or six years after the celebration of the first marriage with Stier. The case certainly is a very remarkable one; what is almost equally remarkable is the view which the judge took of it. He found that the petitioner's statements were true, that she did not consent to marry the respondent, but went through the ceremony as one of betrothal, and, in doing so, was to such an extent under the influence of her mother and the respondent, that she was not a free agent. He therefore pronounced a decree of nullity. Let the reader note that the mother was dead, and the respondent did not appear.

No one can undertake to say that the decision of Gorell Barnes J. was wrong. As between Mr. Stier and Mrs. Ford it was probably just enough, and common humanity inclines one to rejoice that a marriage which was never consummated, and must in any event

have turned out miserable, has been pronounced void. But we do assert, and with some confidence, that *Ford v. Stier*, following as it does upon *Scott v. Sebright*, 12 P. D. 21, sets a most dangerous precedent. It is hard to believe that a girl of seventeen really went through the marriage service without knowing its meaning; it is equally hard to believe that the influence of a mother, and of a man who, according to the lady's account, had never acted as a lover, could in reality amount to coercion or duress. The plain truth is that in *Ford v. Stier* an extension is given to the conception of coercion which makes it possible, in theory at least, for any girl to succeed in a suit for nullity if after her marriage she and her husband live apart. Cases such as *Ford v. Stier* suggest that the law of divorce is not sufficiently elastic, and that judges are tempted to pronounce void marriages which are not really void, but which it would be desirable, did the law allow it, to dissolve.

[Surely free agency or the contrary is a question of fact, and must be dealt with according to the evidence in each case. We do not understand our learned contributor to dissent from any rule of law laid down in *Ford v. Stier*. As to the facts, the judge saw and heard the witnesses, and we did not.—ED.]

'It is, I think, clear,' wrote Sir H. Elphinstone in this REVIEW (vol. v. 53, Notes on the English Law of Marriage), 'that a marriage on a British man-of-war . . . celebrated on the high seas in the presence of a priest is valid.' The very point has now occurred, and has been ruled by the President of the Divorce Division in accordance with Sir H. Elphinstone's opinion (*Culling v. Culling*, '96, P. 116), but it furnishes one more instance of that perilous uncertainty which hangs around what ought to be the clearest of all contracts—marriage. Seventeen years ago the Legislature passed an Act validating retrospectively marriages solemnized on board one of Her Majesty's ships on a foreign station in the presence of the commanding officer, but, English-like, it did not formulate the law for the future. Yet there must always be reasons for people being, in sailor language, 'spliced' at sea. There are, according to Macaulay, only two things to be done on a long voyage, to quarrel or to flirt, and of the two flirtation is much the most attractive.

*In re Castioni*, '91, 1 Q. B. 149, and *In re Arton*, '96, 1 Q. B. 108, 65 L. J. M. C. 23, throw great light, if read together, on the law as to the extradition of persons who may, to use a somewhat vague term, be described as political offenders.

*In re Castioni* shows that an offender, if accused of what is *prima facie* clearly an extradition crime, e.g. murder, cannot be legally

surrendered if the offence is of a political character, i.e. if it is incidental to, and forms part of, a political disturbance.

*In re Arton* shows that when the government of a friendly state demands the extradition of an offender for an offence clearly within the Extradition Act, 1870, and the extradition treaty with that state, the English Court has no jurisdiction to inquire whether the demand for surrender is made in good faith and in the interests of justice, and that the provision of the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3, sub-s. 1, under which a fugitive criminal shall not be surrendered if he prove to the satisfaction of the Court that the requisition for his surrender has in fact been made with a view to try and punish him for an offence of a political character, applies only to an offence which has been already committed.

The combined effect of the two cases is to prove that our judges will interpret the Extradition Act, 1870, and the treaties made under it, in the spirit in which they interpret any ordinary Act of Parliament, and will not cut down the effect of the Act in order to guard against possible or conceivable hardship to political refugees.

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*In re Galwey*, '96, 1 Q. B. 230, 65 L. J. M. C. 38, establishes that a British subject is a person 'liable to be surrendered' within the meaning of the Extradition Act, 1870, s. 6, and that under a treaty like the existing treaty between England and Belgium, the Crown has the option of either surrendering or refusing to surrender a British subject accused of an extradition offence in a foreign country. A way, in short, has been discovered of getting round the difficulty of surrendering a British subject commented upon by the Court in *Reg. v. Wilson*, 3 Q. B. D. 42. Here again we can trace the growth of the feeling in favour of extradition.

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The mode in which our Courts now deal with the law as to extradition is sensible and commendable. It suggests, however, two general reflections which deserve attention.

First—The feeling of the judges, and still more the sentiment of the nation, with regard to the extradition of political refugees has undergone a great though unconscious change during the last thirty or forty years. Many of us can remember the time when Englishmen still in general believed, and not without good reason, that a political refugee was, even though he might have done acts which ordinary morality could not in strictness approve, a patriot whom it would be infamous to surrender at the demand of a tyrant, such, for example, as Louis Napoleon or King Bomba. We all of us now feel, and also not without reason, that when a foreign ruler, such, for instance, as the French President, or

the Government of Switzerland, demands the surrender of a fugitive criminal, it is more likely than not that the criminal, even though he may have taken part in political conspiracies, is a scoundrel whom good men of every country would wish to see duly punished. It is absolutely impossible to put French dynamiters on the same level as Mazzini or even Orsini. This change of sentiment influences the interpretation placed by the Courts on Extradition Acts. The terms of the Act of 1870 do not in practice mean exactly the same thing which they meant twenty-five years ago. Still less do they mean exactly the same thing which the same terms would have meant in an Extradition Act passed say in 1845. The truth is that the construction placed on any document generally depends on certain presumptions or assumptions made by the party construing it. In construing an Extradition Act or Treaty the Courts in 1896 rightly make every presumption in favour of the Government demanding the extradition of a fugitive criminal; fifty, or forty, years ago the Courts, when the offender was a political refugee, made, and rightly made, every presumption in favour of the fugitive criminal.

Secondly—We ought not to be in too great a hurry to extend extradition treaties. Such conventions are suitable only when made with states which are in the strictest sense civilized.

Certificates of shares in an American company on which a form of transfer and power of attorney has been executed in blank, may be liable to probate duty if they are marketable in this country and are operative by delivery.

This is the point decided by *Stern v. The Queen*, '96, 1 Q. B. 211. As it is admitted on all hands that probate duty could not fall on any property of a deceased person which, at the time of his death, is situate in a foreign country, and as it is further admitted that debts due from debtors abroad and shares in foreign companies are in general to be regarded as situate in a foreign country, the judgment of the Queen's Bench Division in *Stern v. The Queen* comes in effect to this; that share certificates of an American company transferable and marketable in England are to be regarded as themselves the property, viz. the shares, which they represent, and, as being such property, are liable to probate duty, and are not merely evidence of a title to property situate in America. In arriving at this conclusion the Court intended to follow *Attorney-General v. Bouwens*, 4 M. & W. 171, but has somewhat extended the operation of that case. In *Attorney-General v. Bouwens* the whole title to payment by a foreign government passed on the transfer of the bonds issued by such government. The certificates



to shares in an American company were marketable securities operative, but not completely operative, to pass the title to American shares. They were, in short, evidence of title to property situate in America, which is admittedly not liable to probate duty. We do not assert that the view taken by the Queen's Bench Division was wrong, but we do assert that its soundness is open to doubt. The judgment in *Stern v. The Queen* has, we believe, been appealed against, and we look with interest to the result of the appeal.

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The question raised in *Stern v. The Queen* was stated by the Attorney-General to be, since the Finance Act, 1894, came into operation, a purely academic one. This statement, though substantially true, is not absolutely correct. Probate duty has indeed been superseded by estate duty, but oddly enough many of the technicalities which have rendered the incidence of probate duty a matter of perplexity will occasionally reappear in discussions about the incidence of estate duty. The latter duty falls on all property passing on the death of the deceased which is situate in the United Kingdom, but it will fall on such property when not situate in the United Kingdom only if the property is liable to legacy duty or succession duty. When therefore the deceased has died domiciled out of the United Kingdom, the liability of his property to estate duty may depend upon the answer to the inquiry, whether the property was or was not at his death situate in the United Kingdom? But whenever this inquiry arises, the Courts will be compelled to fall back on the rules with reference to the situation of personal property established by cases on probate duty (see Finance Act, 1894, ss. 2, 8). *Attorney-General v. Dimond*, 1 C. & J. 356; *Attorney-General v. Bouwens*, 4 M. & W. 171; *Stern v. The Queen*, are not entirely dead; they will continue to exist in a state of suspended animation, and will at long intervals, it is true, come to life again, and once more haunt the Courts.

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The one certain conclusion which readers will draw from *Hoddinot v. Home and Colonial Stores*, '96, 1 Q. B. 169, is that the enactments on which depends liability to pay house duty most grievously need consolidation and simplification. If there is a matter which ought to be made absolutely clear it is what are the circumstances under which the occupier of a house is bound to pay duty for the whole of it. Yet the one point certainly established by *Hoddinot v. Home and Colonial Stores* is that two very intelligent judges found the House Duty Acts extremely hard to understand, and that, though they agreed in the conclusion that

the whole of a particular house was chargeable to duty, they arrived at the conclusion on somewhat different grounds, and felt that the enactments they had before them were hardly comprehensible. The enactments regulating the imposition of house duty ought certainly to be redrafted, and probably ought to be amended by striking out exemptions which are of no real benefit to the public, and render complex what ought to be perfectly clear rules as to the incidence of the tax on inhabited houses.

We have great doubts of the law laid down in *Edwards v. Jenkins*, '96, 1 Ch. 308, 65 L. J. Ch. 222. 'A custom for the inhabitants of several adjoining or contiguous parishes to exercise the right of recreation over land situate in one of such parishes is bad.' Why so? Several parishes may be (or may have been) included in a manor or lordship, and we can see no reason in law why the lord of divers contiguous villis should not, before the time of legal memory, have granted to the inhabitants of all those villis the right to play games on a close within one of them. We concede that such a custom cannot be laid in respect of a 'district' not defined by any boundaries known to public law. So far the case is obviously right. But we submit that, subject to the evidence being sufficient and not too indefinite, (*Dale + Sale*) is as certain, and as good in law for this purpose, as *Dale* alone. The reason of *Galeward's* case is confined to profits *à prendre* and has nothing to do with this.

The people who commit suicide in England from prudential motives—to provide for their families or to 'do the insurance company' like the keen Yorkshireman—are not numerous, but in the land of the almighty dollar suicides deliberately planned are apparently so frequent as to make the title of the suicide-assured a matter of some moment. The offices are clearly at his mercy, and a learned American judge recognizing this fact has lately held that there is in every policy of life insurance an implied warranty not to commit suicide while sane (*Ritter v. Mutual Life Insurance Co.*, 30 American Law Review (Jan.) 154). This fiction of law the learned judge rests on the ground that the insurance company bases its calculations on lives running out to their natural termination, that the assured knows this and contracts on that basis; but apart from the objectionableness of implying warranties, surely the natural comment on this is that suicide can be reckoned with like the gallows or drunkenness or any other factor of life assurance risk. In England an implied warranty is not wanted, because the policy of our law disentitles a man to reap the benefit of his own criminal act—which *felo-de-se* is.

In America this is not so. The better opinion seems to be that title may be acquired through a crime (*Carpenter's Estate*, 32 Atl. Rep. 637: 30 American Law Review (Jan.) 130), even though that crime is parricide. Compared with this our English highwayman claiming an account against his fellow is quite a modest demand. The problem as it presents itself to American lawyers is how a crime can defeat the operation of statutes like the Descent Act or the Wills Act, and no doubt there is a difficulty where an heir murders his ancestor, or a legatee his testator, in reading into the Descent Act or the will a clause of disinheritance or revocation. English law does not attempt to do so, but creates, on grounds of public policy, a personal disability in the criminal to profit by his crime. This principle of public policy does not seem to be generally accepted in America, however it may be in the civil law or English law. The American view is that the law has assigned to each crime its proper punishment, and the Courts have no right to add a fresh penalty in the form of forfeiture.

One aim of the fourth section of the Statute of Frauds is to secure that all agreements with regard to an interest in land should be proved by a note thereof in writing. *X* and *A* agree orally that *X* is to have exclusive possession of certain land for three successive Bank Holidays and to pay £45 for the use of the ground, paying an instalment of £15 for each of the three days. *X* enters and occupies the land for the first of the three days and pays the first instalment of £15. He then refuses either to occupy the ground for the other two days or to pay the balance of the £45. When sued for the amount he pleads that the claim is barred under the Statute of Frauds, s. 4. The Queen's Bench Division has held (*Smallwood v. Sheppards*, '95, 2 Q. B. 627) that *A* is entitled to the whole of the £45. There can be no doubt that this decision is a just one, and we are quite willing to assume that it is in conformity with precedents. Is it, however, possible to deny that it cuts down the effect of the statute? But if so, is it not doubtful whether a law to which the Courts will never willingly give effect ought to remain in the Statute Book?

Lord Coke called the Statute of Treasons a 'blessed statute.' We are more inclined nowadays to call blessed such statutes as the Factory Acts and the Shop Hours Act, 1892. 'The Cry of the Children,' so pathetically chanted by Mrs. Browning, has entered into the ears of the Legislature, and we are not disposed to quarrel with the charters of child labour because they may seem a little overcareful. 'What harm can there be,' it was said in *Pearson v.*

*Belgian Mills* ('96, 1 Q. B. (C. A.) 244), 'in a child cleaning fixed machinery? What danger is there of its being caught by running belts or whirling wheels?' The short answer which the wisdom of Lindley L.J. gives to such special pleading is that the Legislature 'meant children to be kept clear of all moving machinery whatever,' and any one who has practical acquaintance with children, their heedlessness and want of caution, will understand the necessity for interpreting the letter of the law strictly. The same benevolent interpretation has been put on the Shop Hours Act in *Collman v. Roberts* (12 Times L. R. 202). 'Is an errand boy,' to put it shortly, "in or about" the premises when he is running errands?' Corporeally he is not; but he is 'in or about' the business carried on there, and that is enough.

Περὶ παντὸς τὴν ἐλευθερίαν is not only the motto of the Selden Society, as it was of Selden, but of the law of England. Hence its jealousy of by-laws amongst other things—a salutary jealousy, because county councils and local authorities and railway companies, and other autocratic bodies are constantly encroaching on the area of individual liberty, and turning or tending to turn loyal and liberty-loving citizens into 'dumb driven cattle.' *Strickland v. Hayes*, '96, 1 Q. B. 290 is an illustration. Singing profane songs is a proper subject for a by-law, but when a municipal by-law besides prohibiting the singing of profane songs and ballads in the streets goes on to prohibit it 'on land adjacent thereto' it is transcending its proper sphere and the law will give it no assistance. Not that the law approves profane singing: on the contrary, it strongly disapproves it, but it leaves the profane man's punishment to society, to his conscience, to his Church. What the law is concerned with is—not the censorship of private morals—but the annoyance of the public. As to the individual himself, well! perhaps like the late Archbishop Magee the law would rather see England free than sober.

In days like these, when every post solicits us to some new scheme of speculation, the drafting of an investment clause is a responsible task. Given the ideal trustee or trustees, the prudent man of business whom Courts of Equity delight to parade, the settlor or testator cannot do better than give such a paragon an uncontrolled discretion—a free hand; but ideal trustees are not always forthcoming: even if the original trustees—the settlor's own selection—are such, succeeding trustees will not always be. There is the fraudulent trustee, the weakly good-natured trustee, the

sleeping trustee, the unbusiness-like trustee—all so many possibilities of trouble. To give these plenary powers of investing 'as they shall think fit' would be to court disaster. They must be tied up—tethered with a reasonable length of rope. Cestuisque trust who are at the mercy of go-as-you-please trustees will be glad to hear, however, that the words 'as they shall think fit' mean in the eye of the law 'as they shall *honestly* think fit.' They will not enable a trustee to take a bribe for putting the trust fund into some speculative enterprise and then say—'It was authorized: here is the bribe if you like.' (*In re Smith, Smith v. Thompson*, '96, 1 Ch. 71, 65 L. J. Ch. 159.)

The doctrine of ultra vires may be a very necessary one to prevent directors squandering the shareholders' money on chimerical objects: but as an ultra vires borrower the company figures as a consummate hypocrite, not to say rogue. 'True' it says, 'I had your money, but my directors had no power to borrow, and you must be taken to have known they had none. I wash my hands of the whole transaction. You may sue the directors if you like, or if you can on an implied warranty: Good morning.' Thereupon equity descends as a *dea ex machina*, with a fiction of its own in the shape of the doctrine of surrogation; where, that is, the lender's money has been used to pay off the company's debts. It supposes this fiction—the quasi lender and the company's creditor to meet together, and that the quasi lender advances to the creditor the amount of his claim against the company and takes an assignment for his own benefit—would it not be simpler, by the way, if a fiction is to be resorted to, to say that the lender pays off the company's creditor at the request of the company?—anyhow the fictitious transaction is not a borrowing by the company. It does not add to the company's liabilities, but merely substitutes one creditor for another. In a case of *In re Lough Neagh Ship Co.* (1896, 1 I. R. 533), the Master of the Rolls in Ireland has just been giving effect to this surrogation doctrine. The debt paid off with the ultra vires borrowed money was a shipbuilder's debt for which he had a lien. The Court surrogated the lender to the shipbuilder's debt, but why not to his lien? Logically it surely ought.

When the phrase 'contempt of Court' is used, it conjures up to the mind of the layman the picture of some party or witness discharging abusive language at the judge, possibly a missile—a boot or an egg—at the sacred seat of Justice. As a matter of fact, contempt seldom touches the personal dignity of the judge. Its heinousness

consists in its being an interference with the course of the administration of justice—a much sublimer conception. Nothing can possibly be worse in this way than intimidating witnesses, because if witnesses—the best evidence—are not forthcoming, justice must be indeed blindfold. The punishment therefore lately meted out by the President of the Divorce Division to an offender in this way was not at all too heavy. Committal—a month's imprisonment—is an invaluable object-lesson in the principles of law. It is the only way to bring home to the *profanum vulgus* the gravity of an offence like tampering with witnesses.

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We have received a specimen number of *La Administración*, a review of public law, economics, and politics published at Madrid. It appears to be well informed and quite up to the level of similar publications in other continental countries. English readers may be interested in a Spanish publicist's view of the Venezuela controversy. President Cleveland's Message is said to have been framed in most aggressive terms; the attitude of the English Government is described as cool, temperate, and correct. A tender of good offices on the part of Spain is suggested, but the writer seems to overlook the fact that Spain, as the predecessor in title from whom the Venezuelan claim is deduced, could not conveniently act as an impartial mediator. We hope, however, that the question may be well advanced towards a settlement by the time this note is published.

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An interesting paper on the history of common-field tillage in Hungary, by Charles Tagány, of the Royal Archives at Budapest, has by accident not been noticed earlier. It is an extract, as we have it, from a review published in German. We learn that common fields with a compulsory scheme of cultivation (*Flurzwang*) are still to be found in Hungary, and that in the time of Maria Theresa there were still shifting allotments of the arable land. At Debreczen, for example, there was a fresh allotment every seven years. There are traces of an earlier state of things in which land was so plentiful that every member of the community might help himself. Clearly these evidences should be made better known in Western Europe.

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In our last number we printed concerning Mathew and Macnaghten's Reports of Commercial Cases that they 'do not confine themselves to what is *reputable* from the strictly professional point of view.' Whether those words were actionable, *quaere*: for do

not law reports necessarily deal with some things which are not reputable from any point of view? But the word we wrote was *reportable*.

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We have received the first number of the *Deutsche Juristen-Zeitung* (Berlin : Otto Liebmann). It is intended to be a practical organ of the legal profession in Germany, and the approach of a final decision on the question of adopting the Civil Code appears to have in some measure determined the date of its appearance. An introduction by Prof. Laband (who is also joint editor) gives ample warranty of competence, and, so far as an English lawyer can judge, the contents are both learned and business-like.

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We have received an anonymous MS. entitled 'Justice on the March.' The writer is requested to send his name and address to the Editor, it being our rule not to publish or consider anonymous communications. He is also referred to our standing notice on this page.

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*It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances ; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.*

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## THE RIGHTS OF A SUZERAIN.

**I**N President Kruger's dispatch to the British Agent at Pretoria of Feb. 12, 1896, the following passage occurs :

'... the government is compelled not only to remark that it can suffer no interference or intermingling, however well-intentioned, in regard to internal affairs of which mention is made in the above-mentioned telegram dispatch of the Secretary of State, but' &c. . .

The dispatch of the Secretary of State referred to is, of course, Mr. Chamberlain's celebrated dispatch of Feb. 4, recommending certain internal reforms in the South African Republic, by which a measure of autonomy would be granted to the Uitlanders of Johannesburg.

Now this contention of the Transvaal Government, which has been put forward more than once and in more or less emphatic terms during the course of the recent controversy, that Her Majesty's Government can claim no right to interfere in the internal affairs of the Transvaal, does not appear to be by any means so indisputable as the Boer Government maintains.

Let us assume that the rights of suzerainty claimed by the British Government over the Transvaal, by virtue of the combined effect of the Convention of Pretoria of 1881 and the Convention of London of 1884, are admitted. There can, in truth, be little doubt upon the point, although it doubtless suits the policy of certain foreign nations to affect to believe that the whole question is in issue. The effect of the suzerainty of one nation over another is to divest the latter of a portion of its sovereign rights. In other words, this latter becomes a semi-sovereign state.

Semi-sovereign states are usually divided into two classes, (1) those which are the subject of a declared Protectorate, (2) those which, although not the subject of a declared Protectorate, are yet in a certain condition of subordination with regard to some other state. The latter are designated by international lawyers as vassal states, and the state to which they are subordinate is known as the Suzerain Power. The principal criterion of this relationship is the question of international representation (see Pillet, *Revue de droit international public*, 1895, No. 6, p. 598). If a state is subject, in the conduct of its international relations, to the supervision and veto of a foreign power, it is undoubtedly a vassal



state and subject to the suzerainty of that power. And that this is the condition of the South African Republic with regard to Great Britain can, in the face of Article IV of the Convention of London, hardly be denied, and this circumstance alone is sufficient to establish the fact of British suzerainty, whether the word itself was or was not retained in the text of the latter Convention.

With regard to the first category of semi-sovereign states, there is no doubt that the protecting state has wide powers of interference in the internal affairs of the protected state. The exact measure of these rights of interference has been the subject of considerable controversy among international lawyers, and there is little in the way of a general theory to be gleaned from the recognized text-books on the subject, although Ortolan (*Règles internationales et diplomatie de la mer*, t. I. p. 48), Chrétien (*Principes de droit international public*, p. 255), and Holtzendorff (*Handbuch des Völkerrechts*, t. II. p. 102) seem to have come nearest to a satisfactory formula. Shorn of academic verbiage, it amounts to this, that the intervention of the protecting state is justifiable whenever such intervention is necessary in order to safeguard its responsibility towards foreign nations. For it is clear that where one state represents another in its external relations, the former is responsible to foreign governments for the wrongful acts or omissions of the latter, and consequently must be armed with the right to intervene in the internal administration of the protected state for the purpose of guarding against claims for indemnity on the part of foreign governments. This is generally admitted, and starting from this point, it has been possible to draw up a tolerably complete list of the heads under which the powers of intervention of the protecting state naturally fall, as has been done by several writers on international law (see particularly Pillet, *loc. cit.*).

It would seem that the same principles are applicable, in a modified degree, to the relations between vassal and suzerain. As already observed, the protecting state is liable to foreign nations mainly because it represents the protected state in its foreign relations. Is not this the case as between the South African Republic and Great Britain? No doubt the representation of the Transvaal by Great Britain is by no means so complete as in the case of an ordinary protectorate, say, for instance, that of France over Tunis. I am, of course, aware that the Boer Government has a peripatetic and permanently accredited agent who travels from one European capital to another to negotiate with foreign governments on behalf of the South African Republic. But in reality the right of veto reserved to the British Government with regard to any treaty

proposed to be concluded by the South African Republic (with the single exception of the Orange Free State), practically reduces the powers of the Transvaal, in the conduct of its foreign affairs, to insignificance, since it is useless for it to enter into negotiations with foreign states, with a view to ultimate conventions, without having previously obtained the assent of Her Majesty's Government, and consequently the whole conduct of these relations must in fact devolve and depend upon the British Foreign Office. As a corollary, it can scarcely be denied that where the British Government has authorized, either expressly or impliedly, the conclusion of a treaty with a foreign state, it has assumed a certain measure of responsibility, both legal and moral, towards that state for the due observance of the treaty in question, and in the event of its violation there can be little doubt that remonstrance and possibly claims for indemnity would be addressed to the British Government. [I do not desire to be understood as maintaining that the British Government is to be regarded as the guarantor of loans obtained by the Transvaal from foreign states, for these are not 'treaties' in the usual sense of the word, but ordinary contracts.]

It is further submitted that even in the absence of express treaty, Great Britain as the suzerain power, having, in the last resort, the control of the foreign relations of the South African Republic, is jointly responsible with the Boer Government to foreign powers for the internal order of the Republic; and if by reason of misgovernment a state of anarchy or civil war should ensue, by which the lives and property of foreign residents were endangered, it would be the duty of the suzerain power to intervene in order to escape ulterior liability towards foreign powers: for though such liability is not usually recognized as a matter of international law, yet governments have often found it expedient to acknowledge it as a matter of international comity, and thus the result is practically the same. To apply these principles to the condition of things in the Transvaal, it appears to follow logically that Her Majesty's Government has the right, nay the duty, to interfere in the internal affairs of the South African Republic, if the Government of that Republic, by its unjust and tyrannical conduct towards the Uitlanders, jeopardizes the maintenance of order and the security of human life and property.

MALCOLM M'ILWRAITH.

## THE WATER-CARRIER AND HIS RESPONSIBILITY.

[A PROBLEM OF THE PAST WITH A SIGNIFICANCE  
FOR THE PRESENT.]

**T**HERE is no department of our commercial law which possesses so varied and interesting a history as our law of carriers. The countries which gave birth to its rules are not more widely separated in space than the periods in which those rules were formed are distinct in time. Especially is this the case with the law of carriage by water. Some of its principles we copied from the Dutch at the commencement of the eighteenth century; some were connected with the great revolution in maritime commerce inaugurated by the Lombards in the thirteenth and fourteenth centuries, and finally established by the merchants of the Hanseatic League in the succeeding century. Other rules originated at a still earlier period in the application of the principles of a quasi-partnership as a substitute for insurance; for at a time when sea adventures were as perilous as they might be lucrative, losses and gains were not unnaturally shared in common by all members of the 'communitas.'

Much of our law of affreightment admittedly rests upon a Roman foundation. Our conception of general average can be traced further back to the *Lex Rhodia*, but curiously enough our principle of valuing cargo at its destination price for purposes of contribution comes from a Scandinavian practice of the thirteenth century.

The history of isolated legal rules would form indeed but a fragmentary and unsatisfactory investigation. It is therefore desirable to find some central conception around which some of the interesting portions in the history of our carriers' law may be conveniently clustered. The liability of the carrier offers itself as such a conception. The causes which have produced changes in the law of carriage have generally at the same time modified the carrier's liability. And throughout all these changes one may perceive the perpetual recurrence of a problem—the riddle of the sea-carrier's liability—which has presented itself to the jurists of different ages and of different countries, and which now stands awaiting a more satisfactory solution at the threshold of our own law.

The history of the responsibility of the carrier by water naturally

divides itself into three parts. (1) The water-carrier and his responsibility; a problem in Roman law. (2) The water-carrier and his responsibility; a problem in the Middle Ages. (3) The water-carrier and his responsibility; a problem of modern times. Inasmuch, however, as this responsibility is to be considered with especial reference to English law, it will perhaps be objected that the Roman law is not entitled to separate consideration, and that this history should begin with the earliest English records.

To this it may be replied that the earliest records speak of Courts which administered a 'law maryne,' and that the liability of the carrier in this 'law maryne' is best explained after a consideration of Roman law.

Further, a Roman origin has been ascribed to the rule that a common carrier is an insurer of the goods he carries, saving acts of God and the Queen's enemies. According to this theory the rule is an adoption of a special liability imposed on sea-carriers by a praetorian edict; but, according to another view, it is 'characteristically English' and a survival of Teutonic law. The latter theory has been supported by the careful researches of Mr. Justice Holmes, while the advocates of the former have relied too often on vague conjectures. Not only have few facts been adduced to show the mode in which the conception might have been borrowed, but even the nature of the carrier's liability in Rome seems not infrequently to have been misunderstood. Yet to do justice to the theory of a Roman origin without some examination of Roman law would not be possible.

In Austria and in Germany some recent writers appear to regard the theory of a Roman origin as the sole view possible, and refer to the 'act of God and the Queen's enemies' as illustrating the mediaeval objective interpretation of the Latin term 'vis maior.' It will be my object to examine the origin and history of that exemption in English law, and in so doing to see how far such allusions are correct.

A final argument for the separate consideration of Roman law lies in the fact that the recent application of scientific invention to the development of transport trade marks the commencement of a new era. In this new era the law of carriers will be nothing if not international, and we must remember that the principles of Roman law are still enforced in many parts of Europe. Now the carrier's liability is a question which has attracted more attention than any other in Roman law within recent years, and its investigation is of very general interest, as showing how far the principle of the Roman jurists that civil liability should be based on 'culpa' was subject to exception.

Therefore, in this our period of transition, we shall lose nothing by again referring to the writings of the old juriconsults; and even where these furnish no assistance to us in present perplexities, they will enable us to perceive how far altered conditions of transport have produced a development of law.

The present article is accordingly confined to the history of the problem as treated in the Roman system.

In the sixth century after the founding of Rome, the sea-carrier was made an insurer of the goods he carried.

'Ait Praetor: nautae caupones stabularii quod cuiusque saluum fore receperint nisi restituent, in eos iudicium dabo,' D. 4. 9. 1. pr., Edict. Perp. xi. (2)<sup>1</sup>.

We have here the 'iudicium in factum'; the iudex has only to ascertain ( $\alpha$ ) whether the carrier received the goods, ( $\beta$ ) whether he delivered them again.

If the first point is established, but not the second, the sea-carrier is liable apart from any question of negligence.

The formula given in the action would run <sup>2</sup>—

'Si paret N<sup>m</sup> N<sup>m</sup>, cum navem exerceret, A<sup>i</sup> A<sup>i</sup> res, q. d. a., salvas fore recipisse neque restituisse, q. e. r. e., t. p., iudex N<sup>m</sup> N<sup>m</sup> A<sup>o</sup> A<sup>o</sup> c., s. n. p. a.'

This liability, as Pomponius afterwards observed<sup>3</sup>, was independent of special undertaking; it arose simply from the fact that the carrier had received the merchandise for conveyance. Paulus observes that the fact of the carriage being gratuitous makes no difference.

As regards, in the first place, the origin of this remarkable liability, the phrase 'salvum fore recipere,' which occurs in the text of the edict, would appear to indicate that it arose from an autonomous taking over of risk on the part of sea-carriers and innkeepers, whether by means of a unilateral formal declaration with the word 'recipio'<sup>4</sup>, or by a 'pactum,' at first expressed but afterwards understood<sup>5</sup>.

The praetor makes obligatory that which had originally been optional. There is, however, no direct allusion to such an origin in the writings of the Roman jurists.

<sup>1</sup> Lenel, *Das Edictum Perpetuum*, p. 103; Bruns, *Fontes Iuris*, p. 193.

<sup>2</sup> Lenel, p. 104; Rudorff, *E. P.*, s. 47.

<sup>3</sup> D. 4. 9. 1. s. 8 and 3 pr.

<sup>4</sup> Goldschmidt, *Das Receptum Nautarum*, *Zeitschrift für Handelsrecht*, iii. p. 99 et seq. So Bruckner, *Die custodia nebst ihrer Beziehung zur vis maior*, 1889, p. 168.

<sup>5</sup> Pernice, *Labeo* ii. p. 347.

Baron<sup>1</sup>, on the other hand, maintains that the liability originated solely in the action of the praetor, and has very recently explained 'salvum fore recipere' by reference to the early division of travellers' goods into the portion to be carried untouched (salvum) and the portion for consumption on the way. The latter was frequently of considerable bulk and importance, because nothing besides bare necessities<sup>2</sup> could be obtained in the inns at stopping-places, but it was only with regard to the former that the liability was imposed. Comestibles, &c, were taken care of by the passenger himself<sup>3</sup>, and it would seem unreasonable to increase the responsibility of sea-carriers and innkeepers with respect to them.

This proposition is, however, in direct contradiction to Vivian, as rendered by Paulus in D. 4. 9. 4. s. 2, and involves the supposition of a gloss in the last-mentioned text.

Moreover, the explanation gives but one meaning to 'recipere,' viz. to take over the goods; yet in the edict it probably possesses its earlier signification, viz. to take over responsibility with respect to them<sup>4</sup>.

As regards, in the next place, the reasons which induced the praetor to impose the liability, there have been numerous suggestions.

Centuries later, when the nature of the liability had been somewhat modified, Ulpian furnished an explanation of the edict which may have been current in the early commentaries<sup>5</sup>, or may have been peculiarly his own<sup>6</sup>. He describes the 'maxima utilitas huius edicti' in preserving good faith, in insuring the safety of the goods delivered, in preventing fraud and robbery, and the concerting with robbers; for he adds 'nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt coeundi,' D. 4. 9. 1. s. 1. No doubt sea-carriers and innkeepers were not respectable persons, and certainly the country was always infested with robbers<sup>7</sup>, but a far more satisfactory explanation of the edict is to be found in a desire to remove difficulties in matters of proof.

By the edict 'de his qui effuderint,' which dates from the same period, the praetor imposed on the master of a house a duty of insuring safety. The master was held liable when, although without

<sup>1</sup> Baron, *Die Haftung bis zur höheren Gewalt*, 1892; *Archiv f. d. civilistische Praxis*, lxxviii. pp. 240-244.

<sup>2</sup> And see Marquardt, *Privatleben*, p. 455.

<sup>3</sup> Cf. D. 14. 2. 2. s. 2, and Baron's citations from lives of the saints supplied by Usener.

<sup>4</sup> Goldschmidt, *Zeitschr. f. HR.* iii. 97 et seq.; and see Bekker, 'Recipere' und 'permutare' bei Cicero, 1882, *Zeitschr. d. Sav. Stift.* iii. p. 7.

<sup>5</sup> So Dernburg in Grünhut's *Zeitschr. f. d. privat und öffentliche Recht*, xi. p. 340; Baron, *Archiv f. civ. Pr.* lxxviii. 205.

<sup>6</sup> See Pernice, *Labco*, ii. 348, note 9 and D. 4. 9. 3. s. 1.

<sup>7</sup> See Friedlaender, *Darstellungen aus der Sittengeschichte Roms*, 1889, ii. pp. 46-52.

fault on his part, something had been thrown out of a window of his house so as to injure a person in the street below<sup>1</sup>. Before this edict the person injured might in many cases have failed to obtain redress through not having perceived the person who had thrown the article.

The edict '*naut. caup. stab.*' was another application of the same principle<sup>2</sup>. The shipper might not know how his goods had been abstracted or damaged, nor whether there was any one whom he could hold responsible. If there had been '*culpa*' on the part of the carrier it could be easily concealed. It was, therefore, better that the carrier should be held liable for all loss or damage (since he could best take precautions against such loss) than that the freighter should be deprived of his remedy.

For these reasons the insurance liability commended itself to the public, it was continued unaltered for a considerable period, and by the reign of Tiberius it was understood to apply to bargemen who had not been expressly referred to in the terms of the edict<sup>3</sup>. But about this time the harshness of the rule was mitigated<sup>4</sup> in an important manner. The praetor, acting on the advice of Labeo, granted an '*exceptio*' to the carrier by water when the goods conveyed had perished through shipwreck or had been taken by pirates. In later times the '*exceptio*' is referred to in more general terms as being given in any case of loss through '*damnum fatale*,' '*hoc edicto omnimodo qui recepit tenetur nisi si quid damno fatali contingit.*' Exner has pointed out that the idea of such an '*exceptio*' as Labeo suggested was not novel<sup>5</sup>; its introduction appears to have produced no change in the structure of the edictal formula; the precise effect to be attributed to it in modifying the sea-carrier's liability has been much discussed. Certainly he was responsible for all loss, theft, or damage, occasioned by his assistants in the undertaking, or by the passengers whom he had received into his ship. He was also responsible for all other loss or damage which he could not show to be the consequence of '*vis maior*'<sup>6</sup>.

What, then, is the meaning to be attributed to '*vis maior*' in this connexion? This has naturally been considered a vital question in Austria, Germany, and Switzerland, for upon the interpretation given depends the liability attached to railway and steamboat companies, and other carriers by land or sea<sup>7</sup>.

<sup>1</sup> See D. 9. 3. 1.

<sup>2</sup> See generally Exner in Grünhut's Zeitschr. x. pp. 534-542.

<sup>3</sup> See D. 4. 9. 1. & 4.

<sup>4</sup> Otherwise Baron, Archiv f. civ. Pr. lxxviii. pp. 244, 245, the '*exceptio*' was always understood.

<sup>5</sup> Grünhut's Zeitschr. x. p. 530 note 36, citing Livy xxiii. 49, B. C. 215, and xxv. 3. 10, B. C. 212; Polyb. vi. 17. 5; Cicero, De Prov. Consul. 5. 12.

<sup>6</sup> See Goldschmidt, Zeitschr. iii. pp. 93, 94.

<sup>7</sup> H. G. B. arts. 395 and 607; Swiss Ob. Rt. art. 457.

In Italy<sup>1</sup>, and in France<sup>2</sup>, and in all countries which have adopted the principle of the praetor's edict, the subject is evidently not without importance. A consideration of the Roman conception, and its comparison with that exemption of the carrier in English law which is indicated by the phrase 'act of God,' may therefore possess some interest.

Since the days of the glossators two views have alternately dominated as regards the interpretation of 'vis maior'; the one the theory of a subjective criterion, the other that of a criterion objective.

Without discussing the propriety of this terminology, which would lead to the controversy whether the law professes to take cognizance of the will, and not rather of its manifestation, we may here make use of it as that generally accepted.

According to the former view (A) 'vis maior' is simply a mode of expressing the fortuitous character of an event in a particular instance, considered with reference to a certain degree of prudence and foresight on the part of the person alleging it as a ground of exoneration.

According to the opposing doctrine (B) 'vis maior' denotes specified or determinable external events which are in no way dependent on the conduct of the carrier in the particular case, but remain the same for all persons and under all circumstances.

In other words, the sea-carrier was an insurer with certain exemptions which possessed a general external character. I may here note, in reply to an objection to the term 'insurer' as thus used<sup>3</sup>, that in Anglo-American law the word as applied to the carrier has a signification somewhat different from the popular one, both in the purpose and nature of the liability indicated<sup>4</sup>. Throughout this article I use this term in the narrow sense, as merely indicating an absolute liability imposed by law.

It is evident that the form assumed by the theory of a subjective criterion depends upon the degree of foresight and care which is adopted as an index in determining the fortuitous nature of the event. The degree of care may be definitely fixed by the index, or the index may only vaguely denote the degree of care. This will be rendered clearer by several examples.

A. 1. The prevailing view with the glossators<sup>5</sup> was that 'vis maior' was simply the negation of 'culpa levissima,' 'intra levissimam culpam et casum fortuitum nihil est medium.' Here 'culpa

<sup>1</sup> See codice civ. art. 1631; codice de com. art. 82.

<sup>2</sup> See cod. civ. art. 1784; cod. de com. art. 103.

<sup>3</sup> See Baron, l. c., 292.

<sup>4</sup> See *Andrew Burnside v. Union Steamboat Co. of Georgia*, 10 Rich. p. 113 [South Carolina Court of Appeals].

<sup>5</sup> Cf. Gl. ad D. 4. 9. 3.



levissima' is a fixed standard which definitely marks the limit of liability and the commencement of 'casus fortuitus' (which was identified with 'vis maior'). It has, however, long been shown that such a standard is illogical in theory and impossible in practice; nor can a recent attempt to revive the doctrine be considered as successful<sup>1</sup>.

On the other hand, some writers, while guarding themselves against the theory of a 'culpa levissima,' yet speak of a 'diligentia diligentissimi.' This may correspond either to an objective or to a subjective interpretation of 'vis maior.'

Baron<sup>2</sup>, the chief supporter of this terminology, regards the 'diligentia exactissima' (exacta) of the 'paterfamilias diligentissimus' as a technical expression used in the sources to denote liability for 'custodia' (technical sense). The phraseology signifies that there was a possibility of preventing such loss or damage as would occasion liability, although there might indeed be liability in spite of the care of the 'diligens paterfamilias.' So that 'omissio diligentiae exactissimae' need not be 'culpa,' rather are standards of 'diligentia' abandoned. The liability finds its limit in 'vis maior,' whose characteristic is objective irresistibility, and with which therefore even the 'diligentissimus' cannot cope.

It may briefly be noted that this doctrine has been fiercely attacked<sup>3</sup>, not only because it requires the recognition of technical 'custodia' in cases where it is not generally supposed to exist, but also because 'diligentia,' even 'diligentissimi,' seems used in the sources in contradistinction to 'culpa': 'culpa autem abest, si omnia facta sunt, quae diligentissimus quisque observaturus fuisset.' Gaius, D. 19. 2. 25. s. 7.

Baron's interpretation of 'vis maior' will be discussed subsequently with other objective interpretations. A Swiss writer<sup>4</sup> has followed Baron in essentials, but with variations which produce results less satisfactory. With him 'vis maior' is not defined in order to determine thereby the limits of 'diligentia exactissima,' but the latter is regarded as given for the determination of the former. 'Vis maior' is accordingly subjectively interpreted to mean that which is unavoidable by the exercise of 'exactissima diligentia' in the particular case. The writer guards himself against 'culpa levissima' on the ground that neither law nor contract can compel

<sup>1</sup> Huber, *Zum Begriffe der höheren Gewalt*, 1885, but see Leye in Goldschmidt's *Zeitschr.* xxxiii. p. 430.

<sup>2</sup> See his article *Die Haftung für custodia* in *Archiv f. civ. Pr.* lii. p. 44, and his recent work *Die Haftung bis zur höheren Gewalt*, 1892, *Archiv f. civ. Pr.* lxxviii. p. 203, especially 206, 225-237, 288, 294.

<sup>3</sup> See Stintzing, *Ueber vis maior im Zusammenhang mit periculum und Haftung*, 1893, *Archiv f. civ. Pr.* lxxxi. pp. 433-435, &c.

<sup>4</sup> Stucki, *Ueber den Begriff der höheren Gewalt*, 1890.

any person to apply this extreme care; one can only be held responsible for it—a distinction which has been criticized as unsubstantial<sup>1</sup>.

Certainly no *abstract* standard of 'diligentia' higher than that of the 'bonus paterfamilias' can be set up.

A. 2. If, however, this standard itself be taken<sup>2</sup> as indicating the point at which liability ceases and 'vis maior' comes in, 'vis maior' becomes something which under the given circumstances oversteps the bounds of ordinary and reasonable prudence.

No doubt 'vis maior' is sometimes used in contradistinction to 'culpa.' Paulus places them in opposition in D. 13. 7. 30: 'culpam dumtaxat ei praestandam, non vim maiorem,' and again he opposes 'negligentia' to 'casus maior' in D. 2. 13. 7 pr.: 'rationes quas casu maiore, non vero negligentia perdiderit<sup>3</sup>.' But where 'custodia' (technical sense) exists it is evident that 'culpa' and 'vis maior' are not coterminous, but separated by an intervening zone corresponding to liability 'sine culpa.'

The jurist who would go so far as to deny the existence of technical 'custodia'<sup>4</sup> has to explain why 'furtum' was never considered as 'damnum fatale<sup>5</sup>,' although it might admittedly occur without any negligence on the part of the person from whom the thing was stolen<sup>6</sup>. He is driven to the conclusion that the liability 'sine culpa' of the sources only denotes a liability imposed in particular respects on particular grounds, but not a general liability. Thus Pomponius is only thinking of the sea-carrier's liability for loss or damage occasioned by passengers and crew when he declares: 'in locato conducto culpa, in deposito dolus dumtaxat praestatur, at hoc edicto omnimodo qui recepit tenetur, etiamsi sine culpa eius res periit vel damnum datum est, nisi quid damno fatali contingit,' D. 4. 9. 3. s. 1. An interpretation which in view of the general words used appears somewhat strained<sup>7</sup>.

A. 3. Instead of adopting that view we might consider that 'vis maior' denotes in the case of the 'receptum' the limit of a 'diligentia' exceeding that of the 'diligens paterfamilias.' In which case we arrive at the doctrine which has been dominant since the middle of the century.

<sup>1</sup> Bruckner, in the Kritische Vierteljahresschrift für Gesetzgebung und RW. xxxvi. (1894), p. 400.

<sup>2</sup> Cf. Stintzing, Archiv f. civ. Pr. lxxxi. pp. 462, 463, and Bruckner, Krit. VJSchr. xxxvi. p. 404; but see infra.

<sup>3</sup> And on Ulpian in D. 13. 7. 13. s. 1, and Gaius in D. 18. 6. 2. s. 1, see Dernburg, Grünhut's Zeitschr. xi. 338 et seq.; otherwise Baron, Archiv f. civ. Pr. lii. 78, note 41, lxxviii. pp. 236, 237, 273, but on the first text cf. Stintzing, l. c., 434, note 18.

<sup>4</sup> So Gerth, Der Begriff der vis maior im Römischen u. Reichsrecht, 1890.

<sup>5</sup> See Ulpian in D. 17. 2. 52. s. 3.

<sup>6</sup> The old theory of Löhr being abandoned.

<sup>7</sup> See Bruckner's criticism of Gerth, Krit. VJSchrift, xxxvi. 388-399.

No discussion of this view is possible without some reference to that jurist to whose deep researches the prevailing views owe, in no small measure, their very existence. Before the '*Receptum Nautarum*' of Goldschmidt, which appeared in his *Zeitschrift für Handelsrecht* in 1860, the conception of '*vis maior*' had received no detailed examination. In this treatise Goldschmidt investigated fully the precise nature of the carrier's liability in Roman law, and the manner in which that liability had been continued in the commercial law of modern times. The conclusions of Goldschmidt have been regarded as constituting the highest juristic authority to which courts could appeal or commentators refer, and until within the last few years have met with nearly universal acceptance.

According to this authority<sup>1</sup> the criterion of '*vis maior*' is in no way objective. Whether an event does or does not constitute '*vis maior*' is matter for the determination of the judge, who will examine whether, considering the measures which could be expected in the particular case, the loss or damage was absolutely inevitable. '*Ex locato*' the carrier is only bound to exercise the care and prudence of a '*bonus paterfamilias*,' '*ex recepto*' he is required to take all kinds of precautions rendered necessary by circumstances; he is responsible for loss or damage which has been occasioned by the omission of such precautions. This liability is neither the ordinary liability for negligence nor absolute insurance, and apart from the particular case it is impossible to fix exactly the point at which it ceases, and '*vis maior*' comes in. This view is therefore clearly distinguished from that which fixes an absolute standard of '*diligentia*.' No standard is fixed, each case rests on its own merits. There is no liability for '*culpa levissima*,' but negligence will be presumed by law unless the carrier establish the exercise of a care which is greater than that of the '*bonus paterfamilias*.'

Windscheid expressed his agreement with Goldschmidt in essential points. Briefly the sea-carrier is answerable for all loss or damage which he might have avoided by a special personal care of the things delivered to him. This special care is beyond ordinary care and prudence. It does not follow that the carrier is bound to exercise this extraordinary care, but that he omits it at his own risk<sup>2</sup>.

It is difficult, however, to realize the '*maxima utilitas*' of the application of such a principle. Its separation from the normal obligation of '*diligentia*' is so subtle, that one wonders why for practical purposes it should be considered necessary.

<sup>1</sup> *Das Recept. Naut.*, *Zeitschr. f. HR.* iii., especially p. 115, *Verantw. des Schuld.* *Zeitschr.* xvi., especially pp. 328, 329, 369.

<sup>2</sup> *Lehrbuch des Pandektenrechts*, 1890, ii. s. 384 and note 6, s. 264 and note 9.

Goldschmidt<sup>1</sup> admits that between these two liabilities there is no fixed line of demarcation; probably he may sympathize to some extent with Gerth in the latter's recent attempt to define '*vis maior*' with greater precision.

Exner declares that the existence or non-existence of actual negligence has been the only question entertained by those Courts which have avowedly based their decisions on the dominant doctrine. The result is that the liability '*ex recepto*' is assimilated to that '*ex locato*'<sup>2</sup>.

It might seem that Dernburg had minimized this difficulty by bringing into prominence the element of precaution in stationary arrangements. The carrier, he says, like others who carry on permanent occupations, can make fixed arrangements in the maintenance of his business organization against all loss which can be foreseen or prevented. If damage result through the imperfection of such arrangements he is held liable, although there is no '*culpa*' in the particular case<sup>3</sup>.

Although this mode of regarding the subject puts the sphere and purpose of the liability in a clear light, it appears to involve a differentiation between '*culpa*' and the non-exercise of professional experience and prudence which seems hardly warranted. As Exner observes, the actio '*ex locato*' would have furnished a sufficient remedy for damage so occasioned. The surgeon who has injured his patient in the performance of an operation through the employment of defective instruments is liable for negligence, although he made the best use of the instruments he possessed<sup>4</sup>.

Dernburg has replied that a distinction must be drawn between imperfect arrangements in a particular matter and imperfect arrangements in general business organization. This he illustrates by referring to an accident at Steiglitz, where, owing to the smallness of the station platform, a man fell on to the rails and was run over by a passing train. The single passenger could not have required the erection of a larger platform on the strength of his single contract, there has been no negligence on the part of the company; if the railway company is liable such a liability is '*sine culpa*,' and illustrates the nature of '*custodia*' in the strict sense<sup>5</sup>.

This explanation has not passed without comment. Hölder asks whether those who carry on a trade do not owe the same duty to individuals employing their services as they do to the public.

<sup>1</sup> Zeitschr. f. HR. lii. pp. 369, 384, 385.

<sup>2</sup> Der Begriff der höheren Gewalt, 1883, Grünhut's Zeitschr. x. pp. 519-527.

<sup>3</sup> Preuss. Privatrecht, 1882, ii. s. 69 (a), p. 160; Pandekten, 1886, ii. p. 104, note 6.

<sup>4</sup> Grünhut's Zeitschr. x. p. 524.

<sup>5</sup> Begriff der höheren Gewalt, 1884; Grünhut's Zeitschr. xi. p. 343.

Was not the land-carrier in Rome bound 'ex locato' to take precautions against robbers, if he knew that the district through which he would have to pass was infested with them<sup>1</sup>?

It has also been asserted that Dernburg's separation of negligence in fixed trade arrangements from negligence in particular matters is impracticable; that if the railway company knew of the dangerous character of the platform, and did not remedy it, there was actual negligence; and that further the principle of measuring responsibility 'ex locato' by the amount of the individual payment, which some expressions of Dernburg might appear to suggest, would be destructive of commercial law<sup>2</sup>.

These criticisms are not altogether satisfactory. They somewhat lose sight of the main point, which is that the law may exact precautionary measures from those carrying on certain trades beyond any which would, in the absence of special legislation, be established by the ordinary, prudent man. Dernburg himself cites a German law of 1871 which illustrates this. Baron<sup>3</sup>, however, distinguishes this law on the ground that it refers exclusively to arrangements for the preservation of human life and health. Although a pecuniary liability is eventually imposed, this is a secondary matter, and no compensation can atone for injury in those respects. No such obligation to use precautionary arrangements has ever been imposed in respect of goods, damage to them stands in a different category, it is capable of precise valuation and a fitting subject of compensation.

This objection of Baron's does not appear to me to be tenable. Under powers conferred by our Contagious Diseases (Animals) Act, 1878, both land and sea-carriers are required to take special precautionary measures in respect to the conveyance of animals.

But with regard to legislation of this nature in England two points must be noted. In the first place, the Courts do not appear to consider that the carriers are thereby placed under a liability 'sine culpa' with respect to freighters. If an accident of the nature the legislation was intended to prevent occur through the omission of a statutory precaution, the freighter may allege negligence generally, and 'use the act as some evidence of what is due and ordinary care' on the part of a carrier<sup>4</sup>. In the second place, the precautions exacted are of a definite or ascertainable nature.

Thus, as regards the mode in which cattle should be conveyed

<sup>1</sup> Krit. VJSchr. für Gesetzgeb. u. Rechtswiss. 1886, xxvi. p. 536 et seq.

<sup>2</sup> Gerth, Der Begriff d. vis maior, 1890, p. 115.

<sup>3</sup> Archiv für civ. Pr. lxxviii. pp. 301, 302.

<sup>4</sup> See *Gorris v. Scott*, L. R. 9 Ex. 125, and cf. per Pollock B. at p. 130 with *Blamires v. Lanc. and York Ry. Co.*, L. R. 8 Ex. 288, per Brett J., and per Grove J. at p. 289.

by railway companies, it has been found necessary to describe the covering, the buffers, the condition of the floor of the vehicle containing them, the stations at which food and water supplies shall be available, together with numerous other particulars<sup>1</sup>. If such details are necessary where the precautionary arrangements are simply directed to the preservation of the health of cattle, how great particularization would be necessary if, as Dernburg suggests, precautionary arrangements had to be made against every kind of accident.

In the trades in which such obligations were imposed, the number and nature of the requisite arrangements would tend to become definitely fixed; so that 'vis maior,' as denoting the point at which responsibility ceased, would vary with particular trades rather than with particular circumstances. But it is difficult to understand how the law could demand that all precautions generally against every kind of accident to goods conveyed should be taken without requiring insurance against all accidents.

A more serious objection against Dernburg's explanation of the scope and nature of the sea-carrier's liability is raised by Hölder<sup>2</sup>. Why was the innkeeper or sea-carrier liable where no precautionary measures were possible or where none could be reasonably expected? He illustrates this by the case of a traveller coming to an inn where all the rooms are engaged. The traveller, however, consents to sleep in a room in which another traveller has been placed. In the morning he finds that his companion and his watch have disappeared together. It is difficult to base the innkeeper's liability in such a case on any omission of precautionary measures.

Finally, the subjective theory fails to explain why the possibility of special precautions proving ineffectual did not present itself to the Roman jurists<sup>3</sup>, as it did afterwards to mediaeval writers<sup>4</sup>.

I do not think that any attempt to introduce the dominant interpretation of 'damnum fatale' into English law would be successful. Where it prevails the determination of the question whether an event is or is not 'vis maior' is a matter for the judge alone. If this determination presents difficulty to a man of his legal training, it would be hopeless to expect any assistance from an ordinary jury.

This may be illustrated by an incident in *Nugent v. Smith*; a case in which the liability of common carriers was afterwards much discussed.

<sup>1</sup> See the Animals Order of 1886, part iv.

<sup>2</sup> Krit. VJSchr. f. Gesetzgeb. xxvi. p. 537 et seq., and see further Baron, l. c., 298 et seq. <sup>3</sup> E. g. in D. 19. 2. 13. s. 6, and see Baron, l. c., 299.

<sup>4</sup> E. g. Customs of the Sea, c. 23, and Roccus, Notab. d. Nav. note 58, &c.; Straccha 48 and others, cited by Emerigon, c. xii. s. 4, subs. 7.

Five questions were put to the jury with the object of ascertaining the existence or non-existence of the liability of the defendant, as a sea-carrier, in the particular suit<sup>1</sup>. The last of these was, 'Were there any known means, though not ordinarily used by people of ordinary care and skill, by which the defendant could have prevented the injury?' The result is suggestive. 'This question the jury did not answer.' And it would appear unnecessary to suppose that any subjective criterion other than the '*diligentia boni patrisfamilias*' is indicated by the term 'act of God'<sup>2</sup>. While eliminating the element of human intervention, it only denotes 'losses . . . which cannot be guarded against by ordinary exertions of human skill and prudence.' It is sufficient for the carrier to make use of 'the known measures to which prudent and experienced carriers *ordinarily* have recourse'<sup>3</sup>.

I turn now to the objective theory of '*vis maior*,' which has received a scientific development in Exner's '*Begriff der höheren Gewalt*.' According to Exner, '*vis maior*' denoted in Roman law such events as '*vis tempestatis calamitosae*,' '*incursus hostium*,' and others mentioned by Ulpian in D. 19. 2. 15. s. 2. Loss arising from these causes was out of the expected course of life, and the event was in this sense '*casus cui resisti non potest*.' No difficulty was likely to arise in proving that such a phenomenon had occurred<sup>4</sup>. When the praetor, in accordance with the suggestion of Labeo, granted an '*exceptio*' to the sea-carrier in cases of shipwreck and piracy, the '*exceptio*' would in each case particularize the event which the defendant urged in exoneration, e. g. '*nisi per vim piratorum [res] perierunt*.'

Exner advances the following suggestions in support of this proposition. The state had previously made specified and particular events a ground of exoneration<sup>5</sup>. If a general plea of '*damnum fatale*' had been permitted, some definition of so important a term would have been necessitated, in order that the events which came within the '*exceptio*' might be ascertained. No such definition has come down to us. Gaius attempts to elucidate its meaning by the Greek term '*θεοῦ βλά*'<sup>6</sup>. The term never acquired a technical sense, but was employed in a manner similar to that in common use<sup>7</sup>. Exner therefore holds that the '*exceptio*' was '*in factum*,' and considers this suggested by the text D. 4. 9. 3. s. 1. Consequently

<sup>1</sup> 1 C. P. D. at p. 21.

<sup>2</sup> Cf. per Cleasby B.; 1 C. P. D. at p. 443.

<sup>3</sup> Per Cockburn C.J. in *Nugent v. Smith*, 1 C. P. D. at pp. 437, 438; and cf. Story, *Bailments*, s. 512 (a).

<sup>4</sup> Grünhut's *Zeitschr.*, 1883, x. pp. 553, 567-574, and especially 568, 569.

<sup>5</sup> See *supra*, note 5, p. 120.

<sup>6</sup> See l. c., p. 502, n. 3.

<sup>7</sup> And see Columella 1. 7; Pliny, *Nat. Hist.* 18. 28. 69; and also Cicero, *Pro Plancio*, xlii; but cf. Gaius D. 18. 6. 2, and thereon Dernburg, Grünhut's *Zeitschr.* xi. p. 339.

the question whether an event was or was not 'vis maior' would be determined 'in iure' before the praetor. This determination would be without any examination of the circumstances of the particular case, or of the degree of care and prudence exercised by the carrier, so that only an objective character could have been attributed to 'vis maior'.<sup>1</sup> To suppose that 'vis maior' was dependent on the care exercised in the individual case, would be to imagine that all the advantages of the edict had been swept away by the introduction of the 'exceptio.' The principle of the 'receptum' was introduced to eliminate all question of 'culpa' or 'diligentia' in the particular case. It was unlikely that the praetor would raise up again the difficulties in matters of proof from which he had previously escaped<sup>2</sup>. Moreover, according to the subjective theory, a theft showing extraordinary astuteness might be 'vis maior,' yet this view did not present itself to the Roman jurists. Paulus states without qualification, 'nautae actio furti competit, cuius sit periculo'.<sup>3</sup>

Exner thus arrives at the conclusion that although the praetor placed event after event under the category of 'vis maior,' the conception remained unformulated in Roman law<sup>4</sup>. He attempts to accomplish what the Romans left undone. His result is that an event in order to be called 'vis maior' must possess two essential characteristics<sup>5</sup>.

B. 1. Firstly, the damage must be produced within the sphere of the carrier's undertaking ('im Betriebskreise') by a force which originates outside that sphere: 'vis autem est maioris rei impetus... necessitas imposita,' D. 4. 2. 2 and 1.

B. 2. Secondly, the event through which the damage was produced must prima facie belong to a class entirely distinct from those which one expects in the ordinary course of life. The extraordinary character of the event will on the one hand make it easily capable of proof, and on the other irresistible under ordinary conditions<sup>6</sup>.

The standard of 'vis maior' being thus entirely objective, it is possible that in a very few cases 'vis maior' and 'culpa' might co-exist. When this occurs 'vis maior' exempts the carrier from the insurance responsibility, yet the liability 'ex locato' remains. The carrier will therefore be liable for his negligence<sup>7</sup>.

In proceeding to examine these two criteria, it must be admitted at the outset that they do not faithfully represent the

<sup>1</sup> Exner, l. c., 529, note 36.

<sup>2</sup> Ibid. l. c., 529, 549, also 542-548.

<sup>3</sup> D. 4. 9. 4. pr., and see D. 47. 2. 14. s. 17.

<sup>4</sup> L. c., 550; cf. Dernburg, Grünhut's Zeitschr. xi. 337, and Bähr, Krit. VJSchr. xxviii. 40; Gerth, l. c., 6; otherwise Baron, l. c., 290.

<sup>5</sup> L. c., 582.

<sup>6</sup> L. c., 565, 566.

<sup>7</sup> L. c., 574-578.



views of the Roman jurists<sup>1</sup>. Their value lies rather in their rendering the carrier's liability more definite and ascertainable than others previously suggested.

B. 1. As regards the first criterion, there are passages<sup>2</sup> which speak of '*damnum quod extrinsecus contingat*' and '*extraria vis*,' but such expressions hardly indicate an essential characteristic of '*vis maior*.' Moreover the adoption of such a criterion would increase the carrier's liability, and its application would often produce arbitrary, if not inequitable, results. If a railway accident occurs through the sudden illness of an engine-driver the test would not be satisfied, but if through his being struck by lightning, we should have an example of '*vis maior*'<sup>3</sup>.

B. 2. In the second criterion Exner lays too great stress on the unusual character of the event. His view might appear to be supported by Ulpian in D. 19. 2. 15. s. 2.

'*Servius omnem vim, cui resisti non potest, dominum colono praestare debere ait . . . sed et si uredo fructum oleae corruperit aut solis fervore non adueto id acciderit, damnum domini futurum, si vero nihil extra consuetudinem acciderit, damnum coloni esse.*' But the reason of the decision simply is that the extreme heat, if usual, must already have been taken into account in fixing the rent, and cannot therefore be a ground of '*mercedis remissio*.' Ulpian is giving effect to the presumed intention of the parties, he is not fixing a criterion of '*vis maior*.' '*Damnum fatale*' is generally, but not necessarily, unusual. Robbery by brigands must have been comparatively frequent in some places, even during the Empire, yet '*latrocinium*' is always cited as an example of '*vis maior*.' Further, the more one attributes to '*vis maior*' an extraordinary and unusual character, the more distinct becomes the separation between it and '*casus*,' so that it becomes difficult to explain those texts in which '*culpa*' and '*damnum fatale*' are apparently coterminous<sup>4</sup>.

This objective theory has however no lack of advocates<sup>5</sup>. Hölder considers both the above criteria, on the whole, well founded, but refuses to admit that they are sufficiently exhaustive and precise to preclude an examination of the individual case<sup>6</sup>. Another writer accepts them with the modification that '*vis maior*' denotes not merely an event, but a purely accidental event. The inevitable nature of '*vis maior*,' and the fact that it is completely

<sup>1</sup> So Windscheid, ii. p. 401.

<sup>2</sup> E. g. D. 39. 2. 24. s. 3, D. 19. 2. 30. s. 4.

<sup>3</sup> And see Stintzing, l. c., p. 428.

<sup>4</sup> See supra, p. 123, and Dernburg, Grünhut's Zeitschr. xi. p. 338.

<sup>5</sup> Leyen, Zeitschr. f. H.R. xxxiii, 1887, p. 433; Attenhofer, Rechtsgutachten i. S. der Gotthardbahn, 1884; Scholten, Overmacht, 1886.

<sup>6</sup> Krit. VJSchr. xxvi. p. 535.

independent of the volition of the party pleading it are thus emphasized<sup>1</sup>. This view approaches in one respect even more closely than Exner's to the English conception. 'Vis maior' in this sense cannot co-exist with 'culpa,' but, like the 'act of God,' presupposes its absence<sup>2</sup>.

Exner's views have attracted much attention on the continent. Works of practice have carefully examined them<sup>3</sup>, German and Austrian courts have taken notice of them, and a recent writer has advocated their adoption in French law.

In the discussion to which they have given rise, a new literature has sprung up, devoted to the examination of 'custodia,' and the liability of carriers in Roman law. Even before the appearance of Exner's 'Begriff der höheren Gewalt,' several jurists had defined 'damnum fatale' without reference to any subjective criterion<sup>4</sup>. Pernice pointed out that the 'custodia' for which the sea-carrier is liable had never been referred to any standard of 'diligentia.' The plea of 'vis maior' was only available when the damage had been occasioned by events which were in their nature inevitable, such as the forces of nature 'quibus humana infirmitas resistere non potest,' and certain misfortunes caused by man<sup>5</sup>. Brinz<sup>6</sup> also took the characteristic of inevitability as the objective criterion of 'vis maior.' It therefore denotes events which are generally inevitable, as distinguished from those which only become so by reason of particular circumstances. The former class comprise not only events against which no 'custodia' is conceivable, but also those against which no 'custodia' is possible without giving up the undertaking or using quite extraordinary precautions.

These somewhat vague conceptions<sup>7</sup> have more recently been developed by a pupil of Brinz. According to this writer<sup>8</sup> an event which has caused damage is not a ground of exoneration unless the person pleading it can show (1) that the event was not occasioned through 'culpa' on his part, and (2) that all due efforts were made to resist or avoid it. But if there are certain events known to be irresistible, it is only necessary to examine the particular case for the purpose of ascertaining whether 'culpa' existed in the first particular (1). Such events are denoted by the term

<sup>1</sup> Hafner, Ueber den Begriff der höheren Gewalt im deutschen Transportrecht, 1886.

<sup>2</sup> See definition per James L.J. in *Nugent v. Smith*, 1 C. P. D. at p. 444.

<sup>3</sup> See especially Eger, *Frachtrecht*, 1888, i. 259 et seq., and works quoted.

<sup>4</sup> E. g. Weis, *Bemerkungen zu dem receptum der Wirthe*, 1868; *Arch. f. prakt. RW.*, N. F. v. p. 280 et seq., p. 237 et seq., and especially pp. 361-368; *Wächter, Pandekten*, 1881, ii. p. 446, n. 1. On Baron's views, see *infra*.

<sup>5</sup> Pernice, *Labao* ii. 345-347.

<sup>6</sup> ii. s. 68.

<sup>7</sup> See Exner, l. c., 513.

<sup>8</sup> Bruckner, *Die custodia nebst ihrer Beziehung zur vis maior*, 1889, p. 253 et seq.

'vis maior,' and are irresistible either (a) because, besides being unforeseen, they are of such a power that *active* resistance would have been out of the question had they been anticipated, or (b) because simply they are unforeseen<sup>1</sup>.

B. 3. The criterion of 'vis maior' therefore consists in the fact that it denotes events which cannot be foreseen, and in support of this is cited<sup>2</sup> the passage from Ulpian in D. 17. 2. 52. s. 3: 'Damna quae imprudentibus accidunt, hoc est damna fatalia, socii non cogentur praestare...' To this passage I shall return presently. Meanwhile it seems sufficient to observe that the examples furnished in the sources do not bear out the criterion suggested. 'Furtum' is as unforeseeable as 'effractura latronum,' but it is not 'damnum fatale.' The intervention of a private individual in D. 2. 11. 2. s. 9 need no more be anticipated than that of a state official, yet the latter can alone be classed as 'vis maior.' Even where a calamity was so far foreseen that the bailee had time to preserve the goods entrusted to him, it is nevertheless called 'damnum fatale'.<sup>3</sup> Moreover it is difficult to fix any standard which would distinguish events which would generally be called foreseeable from those which would not. Whether an event was or was not foreseeable must depend largely on the particular circumstances of the case, and not on any abstract characteristic of the event itself<sup>4</sup>.

B. 4. The only general characteristic of the examples given in the sources is, as Baron points out, their irresistibility<sup>5</sup>. This, however, must be understood in a commercial, rather than in a scientific sense. He distinguishes irresistibility from inevitability on the ground that the law does not impose on the bailee the duty of removing the object of bailment to some place beyond the sphere in which 'vis maior' may be expected to act. Such an obligation would interrupt the performance of the bailee's contract, and necessitate disproportionate expense. The bailee is exonerated so long as there is no 'culpa' to prevent him availing himself of the plea of irresistibility. In examining the events given as examples in the Corpus Iuris, he notes that they include not only natural events, but also acts of overwhelming human force, such as loss by pirates and acts of state. The former class are especially 'casus,' of which, in opposition to prevailing views, Baron makes the negation of human volition the essential element<sup>6</sup>. To the irresistible 'casus' is assimilated irresistible human force. In discussing isolated instances he admits that brigands might sometimes be

<sup>1</sup> Bruckner, p. 283.

<sup>2</sup> Ibid. p. 280; so Pernice, Labeo, ii. 374, n. 9.

<sup>3</sup> D. 13. 6. 5. s. 4.

<sup>4</sup> Die Haftung bis zur höheren Gewalt, 1892; Archiv f. d. civ. Pr. lxxviii. v. s. 11.

<sup>5</sup> So Gerth, l. c., 150-151.

<sup>6</sup> L. c., p. 284 et seq.

driven back, but this was not a possibility from the ordinary contractual standpoint<sup>1</sup>; the 'incendium' was always 'vis maior' because the Romans regarded it as the conflagration of immovables, the independent conflagration of movables possessed comparatively small importance. When the liability for technical 'custodia' was elaborated by the jurists they unfortunately restricted it to movables, hence 'incendium' remained outside this liability<sup>2</sup>.

As regards the objective character of 'vis maior,' Baron shows that the texts speak of it not only passively, 'cui resisti non potest' (D. 19. 2. 15. s. 2)<sup>3</sup>, but also actively, 'cui humana infirmitas resistere non potest' (D. 44. 7. 1. s. 4). So that it is not the powerlessness of the individual but of mankind which is considered. It has already been observed that no subjective explanation can be considered satisfactory, and that Exner from a different standpoint is also led to an objective interpretation.

Various general expressions of the Roman jurists seem to point in the same direction<sup>4</sup>. And it is in accordance with this view that the possibility of the co-existence of 'vis maior' and 'culpa' is alluded to in the *Corpus Iuris*<sup>5</sup>.

But leaving out of consideration rare occasions on which that which was generally irresistible became, through special circumstances, resistible by the 'bonus paterfamilias'; 'culpa' and 'vis maior' would be concurrent ( $\alpha$ ) when position within the field of operation of 'vis maior' could be attributed to fault<sup>6</sup>.

A second case, however, seems possible ( $\beta$ ) when 'vis maior' is not of such a nature as to remove the chattel from the control of the person in charge of it, but is only a force causing deterioration. The extent of depreciation may then depend on the conduct of this person, so that 'culpa' and 'damnum fatale' may again co-exist.

But 'vis maior' (when a ground of exemption to bailees) is generally considered as taking the movable altogether from the bailee's control, whether by carrying it away or by suddenly destroying it. Here 'culpa' can exist only in the first particular ( $\alpha$ ). If this be negatived, or if position within the field of operation be considered without reference to circumstances leading up to such position, there can be no possibility of negligence, and 'vis maior' and 'culpa' are properly put in opposition<sup>7</sup>.

Thus in certain cases 'vis maior' may be a ground of exoneration, because it negatives the possibility of 'culpa.' But there is

<sup>1</sup> Baron, l. c., pp. 294 and 295.

<sup>2</sup> L. c., 295-297.

<sup>3</sup> And cf. D. 13. 6. 18 pr., C. 4. 65. 28, C. 5. 38. 4.

<sup>4</sup> Thus cf. Labeo, D. 39. 2. 24. s. 4.

<sup>5</sup> Ulpian, D. 17. 2. 52. s. 3, D. 13. 6. 5. s. 4; Gaius, D. 3. 5. 21.

<sup>6</sup> I. 3. 14. s. 2; Paulus, D. 13. 7. 30; Gaius, D. 13. 6. 18 pr.; and see Ulpian, D. 17. 2. 52. s. 4; D. 19. 2. 11. s. 1.

<sup>7</sup> E. g. D. 2. 13. 7 pr.; D. 13. 7. 30.

another way in which it furnishes a ground of exemption, viz. where it gives effect to an intention of which the law takes cognizance. It is in this latter respect that the conception was regarded by Seneca:

'Sponsum descendam, quia promisi; sed non si spondere me in incertum iubebis, si fisco obligabis. Subest, inquam, tacita exceptio: si potero, si debebo, si haec ita erunt. Effice, ut idem status sit, cum exigis, qui fuit, cum promitterem: destituere levitas erit. Si aliquid intervenit novi, quid miraris cum condicio promittentis mutata sit, mutatum esse consilium? Eadem mihi omnia praesta, et idem sum. Vadimonium promittimus, tamen deserti non in omnes datur actio: deserentem vis maior excusat<sup>1</sup>.'

Here 'vis maior' excuses performance; its non-occurrence is an instance of the 'tacita exceptio.'

Now in the case of bailment it is the intention of the contracting parties to which the law endeavours to give effect—'nam hoc servabitur, quod initio convenit (legem enim contractus dedit)<sup>2</sup>.' Here, as elsewhere, 'subest, inquam, tacita exceptio: si potero.' To resist 'vis maior' is impossible, hence the textual sequence '... incendia, aquarum magnitudines, impetus praedonum a nullo praestatur.'

It is only where the occurrence of 'vis maior' is the condition of an obligation whose subject-matter is (say) payment of indemnity<sup>3</sup> that 'vis maior' ceases to be an implied exception. In every other case it must be understood as outside the contemplation of the contracting parties, and its non-occurrence the most striking instance of the 'tacita exceptio' which Seneca describes. But from denoting a particular instance of the implied exception 'casus maior' might very naturally come to denote the implied exception itself. This has happened with 'act of God' in English law (in so far as it is said to excuse performance of contract).

'Vis maior' would thus have provided a convenient name for a conception which suffered from lack of one, and which can only be generally described as indicating 'an event which' (in the words of Sir Frederick Pollock) 'as between the parties and for the purpose of the matter in hand cannot be definitely foreseen or controlled<sup>4</sup>.' There is hardly sufficient evidence to say whether this extension was fully effected, but the before-mentioned passage from Ulpian (D. 17. 2. 52. s. 3), the way in which samples of 'vis maior' are mixed up with implied references to the intention of the contracting parties in D. 19. 2. 15. s. 2<sup>5</sup>, and the citation of

<sup>1</sup> De Beneficiis, IV. xxxix. ed. Gertz, p. 86.

<sup>2</sup> Ulpian, D. 50. 17. 23.

<sup>3</sup> See C. 4. 23. 1; D. 19. 2. 9. s. 2.

<sup>4</sup> Principles of Contract, 6th ed. p. 397.

<sup>5</sup> See supra.

examples of 'vis maior' as illustrations of 'casus fortuitus' (I. 3. 14. s. 2; C. 4. 24. 6), which is said to be unforeseeable, are all, it seems to me, indications of a tendency in that direction. Where however 'damnum fatale' denoted an exception to a liability imposed by law independently of particular contract (as in the case of the 'receptum') it must (like 'act of God' in a similar case) have always preserved its objective signification.

The sea-carrier was therefore liable unless an accident occurred which was irresistible 'in abstracto'; and by 'irresistible' I understand something which could not be resisted even if apparent in contradistinction to something which could have been prevented if only its operations had not been secret<sup>1</sup>, e. g. 'furtum.'

To the Roman conception of 'damnum fatale' there are, however, two serious objections. In the first place, it does not preclude the possibility of fraud and collusion.

Acts of overwhelming human force are irresistible, but it might be convenient for the bailee, now and then, to assist in their operations. Hence it had to be noted that 'vis maior' was only a ground of exoneration 'si nihil dolo . . . acciderit' (D. 17. 2. 52. s. 3, and see D. 19. 2. 9. s. 4).

In the second place, the criterion adopted is not sufficiently precise. 'Vis tempestatis calamitosae' is doubtless 'damnum fatale' (D. 39. 2. 24. s. 4), but what should we say about Vivian's 'minima tempestas' (D. 39. 2. 24. s. 10)? Mice are not to be considered irresistible (D. 19. 2. 13. s. 6), but why should we draw the line at jackdaws and starlings (D. 19. 2. 15. s. 2)? It is everywhere difficult to fix the point at which 'vis maior' comes in.

Exner's criteria, although they depart from the classical signification of 'vis maior,' are much more definite and precise, and I hope to show hereafter that 'act of God' is not open to either of the objections I have just mentioned.

For the reasons stated I arrive at the conclusion that the adoption of the Roman conception in modern law can never be attended with beneficial results<sup>2</sup>.

Other definitions of 'vis maior' have been suggested<sup>3</sup>, but those which appeared to me especially important have now been examined in detail.

<sup>1</sup> Cf. Pliny, xviii. 28, 69.

<sup>2</sup> So Gerth, l. c., 211; and see Bähr in Krit. VJSchr. xxviii. (1886), p. 409. Gelpke (Gutachten über die Frage: Empfiehlt sich die Anwendung des Begriffs der höheren Gewalt im bürgerlichen Recht?) discusses the whole question.

<sup>3</sup> See Stintzing, Archiv f. civ. Pr. lxxx. (1893), pp. 462, 463; and cf. with note 4, p. 134; also Von Hollander, Vis maior als Schranke der Haftung nach römischem Recht, 1892; but thereon Stammer, Sächsisches Archiv f. bürgerliches Recht, iii. (1893), pp. 70, 71, and Bruckner, Krit. VJSchr. xxxvi. 403.

The liability of the carrier by sea, like that of the carrier by land, could be modified through special agreement, through mora, or through misconduct respecting the object carried. The Roman law on these points is the same as that applicable to bailees generally, and has therefore been already discussed in the pages of this REVIEW<sup>1</sup>.

It is not, however, on the ground that innkeepers and sea-carriers could contract themselves out of their severe responsibility that Ulpian<sup>2</sup> replies to any alleged harshness of the edict, but by saying 'nam est in ipsorum arbitrio ne quem recipiant.' This somewhat curious reason is apparently in conflict with another passage<sup>3</sup>, in which Ulpian declares that an innkeeper is not at liberty to refuse accommodation to passing travellers, 'nec repellere potest iter agentes.' If Ude's theory<sup>4</sup> could be accepted, according to which 'recipere' only means to take over responsibility and the 'salvum fore recipere' of the edict indicates nothing but a praetorian pact, difficulties would vanish. But 'recipere' here signifies to receive the person rather than the higher liability in respect of him or his property<sup>5</sup>, and the harmonizing of the two texts may still afford exercise for scholastic ingenuity<sup>6</sup>. The glossators, followed by Cujas, Pothier, and Glück, read 'neminem recipere' instead of 'ne quem recipiant.' In other words, sea-carriers must carry for all who applied to them, but no one need be a sea-carrier. Guyet<sup>7</sup> supposed the first passage referred to the persons 'qui habitandi causa recipiuntur,' and the second to those 'qui hospitio recipiuntur.' But the opinion usually accepted is, that Roman innkeepers and sea-carriers were under no obligation to receive or carry for all who applied to them, and that the 'nec repellere potest iter agentes' merely signified that such a course would be detrimental from a business point of view<sup>8</sup>.

The question whether the liability for all loss or damage unoccasioned by 'vis maior' was applied to other classes of persons besides those mentioned in the edict has given rise to very different expressions of opinion. Goldschmidt and Dernburg regard the liability as anomalous. With Windscheid and Brinz it is not anomalous, but it is not to be considered as frequently imposed. Baron and Bruckner perceive indications of its existence in

<sup>1</sup> Schuster, Liability of Bailees, L. Q. R. ii. p. 195 et seq.

<sup>2</sup> D. 4. 9. 1. s. 6.

<sup>3</sup> D. 47. 5. 1. s. 6.

<sup>4</sup> Das receptum nautarum ein pactum praetorium, Zeitschr. der Sav. Stift. xii. (1891); see pp. 70, 71.

<sup>5</sup> Cf. D. 4. 9. 1. s. 1 and 3 pr.; Baron, l. c., p. 239, note 56.

<sup>6</sup> On the question see Madai, Sind Gastwirthe wirklich berechtigt Reisende abzuweisen? Linde's Zeitschr. xviii. p. 376; and briefly Carnazza, Il diritto commerciale dei Romani, 1891, pp. 109-112.

<sup>7</sup> Archiv f. civ. Pr. xvii. 41.

<sup>8</sup> See Vangerow, iii. s. 648. n. 1.

nearly every variety of bailment. The reasons, both of practical justice and of commercial expediency, in favour of imposing on trade bailees a responsibility far beyond that of one for personal negligence are ably set forth by Baron in a chapter ('Die inneren Gründe') of the work I have frequently referred to. Pernice<sup>1</sup> considers that the liability for 'custodia' had a wide application in early times, but that after Hadrian the stricter liability was retained in comparatively few cases.

The whole subject of 'custodia' I desire to reserve for a separate work. It need only be remarked that it seems to me unlikely that a responsibility which involved the liability of master for the torts of free servants and employees could ever have been applied to bailees without this latter liability surviving<sup>2</sup> in all cases in which the duty of 'custodia' had originally existed.

The first case in which a master was made unconditionally liable for the torts of his employees would be when the praetor issued the edict 'naut. caup. stab.' It is true that in the 'actio in factum ex recepto' for the simple value of the thing lost, stolen, or damaged, this liability was not separated from the master's liability for acts of passengers or guests. The distinction was only effected when a penal action was brought for double the value of the thing in question ('actio in factum, in duplum'). In that case the sea-carrier was no longer considered liable for the doings of passengers, and the innkeeper ceased to be answerable for the tort of a passing guest<sup>3</sup>.

Afterwards in the contract 'locatio operis' the principle of the liability of master for servant was adopted and given to the world as a distinct conception. Gaius recognizes it in his tenth book on the provincial edict in describing the liability of a carrier by land:

'Qui columnam transportandam conduxit, si ea, dum tollitur aut portatur aut reponitur, fracta sit, ita id periculum praestat, si qua ipsius eorumque, quorum opera uteretur, culpa acciderit: culpa autem abest, si omnia facta sunt, quae diligentissimus quisque observaturus fuisset.' D. 19. 2. 25. s. 7.

Some writers have considered that the sea-carrier's liability for technical 'custodia' is extended to the carrier by land<sup>4</sup>, but this view has not met with general acceptance<sup>5</sup>. The controversy surrounding the interpretation of the 'que' in the 'eorumque,

<sup>1</sup> And see Bierman, *Custodia und vis maior*, Zeitschr. d. Sav. Stift. xii. (1891), p. 33.

<sup>2</sup> Cf. its extension in English law, Holmes, 230; and see Code Napol., arts. 1727, 1384; Baron, l. c., 223 et seq., 215 et seq.

<sup>3</sup> D. 4. 9. 6. s. 3; D. 47. 5. s. 6; and see Denisse, *Du Contrat de Transport par Mer en Droit romain*, pp. 36, 37.

<sup>4</sup> Baron, l. c., 257; Lehmann, Zeitschr. d. Sav. Stift. ix. (1888), p. 118 et seq.

<sup>5</sup> On the question see Goldschmidt, Zeitschr. iii. p. 352 et seq.



quorum opera uteretur' will not here be touched upon. The view adopted is that of Dernburg and Brinz, in opposition to the theory of Goldschmidt and Windscheid<sup>1</sup>.

The 'conductor operis' is liable for his own 'culpa'; he is also liable for the 'culpa' of his employees so far as it occurs in the execution of the work. The responsibility of master for servant has passed from the sphere of the 'familia' to that of commercial enterprise.

It would be interesting at this point to consider how far the principles of agency were recognized in the relation of ship-masters to ship-owner, firstly by means of the 'actio exercitoria,' and afterwards in the privileges granted to ship-owners engaged in the immense grain traffic. But the examination of this, as of other points in maritime law, would be beyond the scope of this article. Where English rules of affreightment have had a Roman origin this may be more conveniently ascribed to them in dealing with the history of those rules themselves.

In considering the general liability of the carrier, one perceives that in Roman law it is especially remarkable for the wide application it affords to the principle of vicarious liability. The sea-carrier is responsible for the torts of passengers and crew, the ship-owner on the contracts of the masters made within the scope of their employment, the land-carrier for the negligence of his assistants. Yet this principle was always in opposition to conceptions of abstract justice, and only to be tolerated on strong grounds of expediency. Even primitive justice<sup>2</sup> recognized the separation of the offender from the unoffending in the practice of noxal surrender. The paterfamilias, to save himself and family from indiscriminating vengeance<sup>3</sup>, delivered up the offender to the injured party. Long afterwards the Romans not only endeavoured to isolate the offender from other persons, but the blameworthy state of mind from other states of mind. It is said that it is beyond the power of human law to take into consideration the personal equation of the individual. However that may be, the isolation just mentioned was successfully effected in the creation of that abstract entity the ordinary, prudent man, and the doctrine of basing civil liability on fault elaborately developed. This doctrine was even applied to animals in determining the liability

<sup>1</sup> Dernburg, ii. p. 102; Brinz, ii. p. 278; Goldschmidt, *Verantw. des Schuldners für seine Gehülfen*, *Zeitschr.* xvi. (1871), 287-382; Windscheid, ii. p. 461; and cf. *Stintzing*, l. c., 441, n. 26.

<sup>2</sup> See Girard, *Les Actions Noxales*, 1887 and 1888, *Nouvelle Revue Historique de Droit*, xii. at p. 51 et seq.; Leist, *Graeco-italische Rechtsgeschichte*, 1884, p. 500.

<sup>3</sup> Girard, l. c., p. 40 et seq.; Bekker, *Aktionen*, p. 183 et seq.

of their owners<sup>1</sup>. It is not therefore surprising to find Gaius endeavouring to explain the vicarious liability of the sea-carrier for the acts of his assistants on the ground that the selection of such persons remained in his own hands<sup>2</sup>. And perhaps at the present day the continuing influence of the doctrine may be detected in the attempts of recent writers to interpret 'vis maior' by reference to the question of 'diligentia.'

Doubtless, the basing of liability on 'culpa' represents an ideal the realization of which in all jural relations is, in the abstract, greatly to be desired<sup>3</sup>; yet in certain cases, as we have seen, the Romans extended the application of vicarious liability. Some writers have attempted to explain several of these cases by reference to 'custodia' conceptions formed at a time when the ideal was as yet unrecognized, but a better reason is found in motives of commercial expediency and difficulties arising from the non-isolation of the individual in the increasing complexity of human relations.

The riddle of the sea-carrier's liability in Roman law has now been placed before the reader; yet, in concluding this article, attention may be drawn to a matter not unconnected with the same problem. I refer to the connexion between contracts relating to the carriage of goods and contracts of loan. From early times the sea-carrier bought the merchandise which he conveyed with borrowed money, and his obligation to repay this loan was absolute.

And in the 'foenus nauticum' the lender took over only a limited risk of the sea damage, while in other respects the carrier continued to bear the whole risk. So that the idea of having to pay for damage or loss to the goods carried out of his own pocket was familiar to him long before he played the part of a bailee and came under the provisions of a praetorian edict.

In ancient law one perceives widespread traces of this connexion between contracts of loan and contracts of carriage. According to some writers<sup>4</sup> the Babylonian contract of affreightment was nothing but a variety of loan, and the freight paid in advance represented the money lent. At a much later period Ulpian speaks of advanced freight as 'vecturam quam pro mutua acceperat,' and it appears from the rescript of Antoninus which he quotes that if the ship were lost, this loan could be recovered from the

<sup>1</sup> See Vangerow, iii. p. 597; and cf. Scaevola in D. 9. 1. 1. s. 11, with D. 9. 2. 52. s. 1.

<sup>2</sup> D. 44. 7. 5. s. 6.

<sup>3</sup> See Goldschmidt, Zeitschr. iii. p. 89.

<sup>4</sup> Revillout, Sur le droit de la Chaldée cont. tab. nos. 95, 28, and 30, pp. 448 et seq. Appendix to Les Obligations en Droit Egyptien.

carrier<sup>1</sup>. And through the Middle Ages advanced freight was still regarded as a kind of loan<sup>2</sup>.

We see the same connexion between contracts of loan and contracts of transport in the maritime loan of the Athenians, which the speeches of Demosthenes<sup>3</sup> in shipping cases have rendered familiar to us, and the principles of which transaction were subsequently borrowed by the Roman lawyers<sup>4</sup>.

Everywhere the carrier is a needy man, and a man generally despised. Centuries before the Christian era the orthodox Hindu dared not sit at meat with him for fear of losing caste, nor had his reputation improved when in the days of Ulpian a reference to his nefarious propensities was considered a sufficient explanation of the edict.

One naturally desires to examine how far this condition of the sea-carrier affected his liability in legal systems earlier than that of Rome, but the necessary data for such an investigation are wanting. All that can be said is that the law of carriers is no new thing. With care and with forethought its elements were fashioned in the marts of Babylon, on the shores of the Indian Ocean, and amid the isles of Greece. The elements thus fashioned did not completely disappear with the civilizations under which they first received an external existence, for in the Roman system some important conceptions of earlier transport law formed in association a more complex law of affreightment than can previously have existed. We have yet to see how, when the Roman power passed away, the principles developed beneath its protection were in their turn preserved to form in new combinations a law of sea-carriage even more vast and complex. Labours for sake of justice were thus not lost:

'. . . that which was Good  
Doth pass to Better—Best.'

J. B. C. STEPHEN.

<sup>1</sup> D. 19. 2. 15. s. 6; and see Labbé, *Difficultés relatives à la perte de la chose due*, no. 109, quoted by Denisse, l. c., 75 et seq.

<sup>2</sup> Cujas, *Observ. lib. iii. ch. 1*, Kuriche *Quaestiones* 34; Emerigon, ch. viii. s. 8. subsect. 2.

<sup>3</sup> Orations against Dionysodorus, Zonothemis, Phormio, and Lacritus, but on the last Schoeffer, *Demosthenes und seine Zeit*, iii. pt. ii. p. 286, note 3; and on the whole question, Dareste, *Du prêt à la grosse chez les Athéniens*, *Revue Historique de Droit Français*, xiii. p. 5 et seq.

<sup>4</sup> D. 22. 2; C. 4. 33; so Pardessus, *Lois Mar. i. 70*; Goldschmidt, *Untersuchungen sur D. 45. 1. 122. s. 1*, p. 6; Matthias, *Das Foenus Nauticum*, p. 4.

## THE HISTORY OF THE PATENT SYSTEM UNDER THE PREROGATIVE AND AT COMMON LAW.

**N**OTWITHSTANDING a general admission of the theoretical importance of an acquaintance with the principles and practice of the patent system under the common law, it will, nevertheless, be allowed that in practice the Statute of Monopolies has been regarded as the first and final source of authority. In 1827, however, when the subject of patent law reform first began to claim the attention of the Legislature, an effort was made by the Lower House to secure more accurate and positive information. In this year the Crown, in compliance with a resolution of the House, ordered a return to be prepared 'of the titles and dates of all special privileges and patents granted in England previous to March 1, 1623, and stating whether for English or foreign manufactures and inventions.' Unfortunately, the resources of the Keepers of the National Records proved unequal to the demands made upon them; and as a matter of fact the return was never presented. The resolution, nevertheless, deserves to be rescued from the oblivion into which it has fallen. For, while on the one hand it excludes as foreign to the inquiry an investigation of the commercial privileges of the trading companies<sup>1</sup>, it includes all grants made in respect of manufactures or inventions irrespective of the nature of the privileges conferred therein. In other words, we are told to look, not for Monopoly patents in the etymological sense of the words, but for grants made in furtherance of particular industries. With this clue to guide us we shall at once proceed to inquire, firstly, at what period the Crown by means of its grants first actively interfered in the promotion of industry, and secondly, what relation these grants may be found to bear to the first recorded Monopoly patents of invention. For this purpose we may briefly summarize the conclusions which may be obtained from a perusal of any standard history of industrial progress in this country.

During the period of history known as the Middle Ages, the industrial attainments of the English were far below the level of their continental rivals, France, Germany, Italy, Spain and the Low Countries. Moreover, throughout Europe progress in the manufacturing arts is found to be due, not so much to individual experimental effort, as to the slow infiltration of improved

<sup>1</sup> See note on p. 153.

processes, the source of which is ultimately traceable to the more advanced civilization of the East. As late as the sixteenth century the type of English society was mainly that of a pastoral and mining community, exchanging its undressed cloth, wool, hides, tin and lead for the manufactures of the continent and the produce of the East. The rise of the native cloth industry in the fourteenth century gave to this country her first considerable manufacturing industry : and, inasmuch as the development of the industry is universally attributed to the fostering influence of the Crown, it will be necessary to scrutinize somewhat closely the various grants by means of which these results were obtained. For the facts here presented no originality is claimed. Their connexion, however, with the history of patent law has never yet been properly established.

In the letters of protection to John Kempe and his Company, the text of which is here reproduced from Rymer, will be found the earliest authenticated instance of a Royal grant made with the avowed motive of instructing the English in a new industry.

*Pro Johanne Kempe de Flandria, Textore Pannorum, super Mestero suo exercendo.*

A. D. 1331. Pat. 5 Ed. III, p. 1, m. 25.

REX Omnibus Ballivis, etc., ad quos, etc., Salutem . . . . .

SCIATIS quod, cum Johannes Kempe de Flandria, Textor Pannorum Lancorum, infra Regnum Nostrum Angliae causa Mesteri sui inhibi exercendi et illos qui inde addiscere voluerint, instruendi et informandi, accesserit moraturus et quosdam Homines et Servientes ac Apprenticios de Mestero illo secum adduxerit, . . .

SUSCEPIMUS ipsum Johannem, Homines, Servientes ac Apprenticios suos praedictos, ac Bona et Catalla sua quaecumque, in protectionem . . .

PROMITTIMUS enim nos aliis Hominibus, de Mestero illo, ac Tintoribus, et Fullonibus venire volentibus de partibus Transmarinis, ad morandum infra idem Regnum nostrum ex causa praemissa, consimiles litteras de Protectione fieri facere debere.

IN CUJUS, etc. quam diu Regi placuerit duraturas. Teste Rege apud Lincolniam, vicesimo Tertio die Julii. . . . .

Here we have, not a solitary instance of protection, but the declaration of a distinct and comprehensive policy in favour of the textile industry ; for the grant contains a general promise of like privileges to all foreign weavers, dyers and fullers, on condition of their settling in this country and teaching their arts to those willing to be instructed therein. Nor is this all. In 1337 these letters patent were expressly confirmed by a statute framed for the protection of the new industry, cap. 5 of which enacts, that

all clothworkers of strange lands, of whatsoever country they may be, which will come into England, Ireland, Wales, and Scotland, and within the King's power, shall come safely and surely and shall be in the King's protection and safe-conduct to dwell in the same lands, choosing where they will; and to the intent that the said clothworkers shall have the greater will to come and dwell here, Our Sovereign Lord the King will grant them franchises as many and such as may suffice them<sup>1</sup>.

As it is with the continuity rather than with the success of the new policy that we have here to deal, we shall briefly enumerate in their chronological order the grants which appear to have been issued in furtherance of the above object. In 1336 similar letters were issued (10 Ed. III, Dec. 12) to two Brabant weavers to settle at York in consideration of the value of industry to the Realm. In 1368 (42 Ed. III, p. 1) three clockmakers of Delft were invited to come over for a short period. In the following reign we are informed (Smiles, *Huguenots*, p. 10) that the manufacture of silk and linen was established in London by the king by the introduction of similar colonies from abroad, but whether by letters patent or otherwise has not been ascertained. The first instance of a grant made to the introducer of a newly-invented process will be found in letters patent dated 1440 (18 H. 6. Franc. 18. m. 27) to John of Shiedame, who with his Company was invited to introduce a method of manufacturing salt on a scale hitherto unattempted within the kingdom. Twelve years later, in 1452, a grant was made in favour of three miners and their Company, who were brought over from Bohemia by the king on the ground of their possessing '*meliores scientiam in Mineriiis*' (Rymer, xi. 317).

These instances, although, probably, not exhaustive of the industrial grants of the fourteenth and fifteenth centuries, sufficiently illustrate the well-known citation from the Year Book, 40 Ed. III, fol. 17, 18, to the effect that the Crown has power to grant many privileges for the sake of the public good, although *prima facie* they appear to be clearly against common right.

With the alchemical patents of Henry VI, wrongly assigned by Hindmarch to the reign of Edward III, we must deal briefly.

<sup>1</sup> In the recent report of the Hist. MSS. Comm. xiv, pt. viii. p. 7, Lincoln, there is an ordinance dated May 1, 1291, which at first sight carries back this policy of encouragement to a still earlier date. It runs as follows; 'and that men may have the greater will to labour in the making of cloth in England, Ireland, and Wales, We will that all men may know that We will grant suitable franchises to fullers, weavers, and dyers, and other clothworkers who work in this mystery, so soon as such franchises are asked of us.' The '*Athenaeum*,' however, points out from internal evidence that the true date of the document is probably May 1, 1326. See also Calendar of Patent Rolls, 1327-30 under date May 1, 1327, where it appears that the first act of Ed. III. was to cause a renewal of the '*Ordinance of the late king*.'

In 1435-36 two successive Commissions were appointed to inquire into the feasibility of making the philosopher's stone for medicinal and other purposes. Respecting these Commissions we are assured by Prynne in his *Aurum Reginae* that they proved 'entirely abortive for aught that he could find.' The fiction of a monopoly having been intended, based upon an obviously inaccurate account in Moore's Reports, p. 671, may be dismissed as the invention of a later date. Other so-called alchemical patents resolve themselves into either warrants for the arrest of the individuals concerned, or dispensations from the penal statute of 5 Henry IV, by which the practice of transmutation was made a felony. In any case the connexion of these grants with the history of patent law must be considered as exceedingly remote.

With the accession of the Tudor dynasty the patent system underwent a change which divested it of all constitutional value. In place of the open letters for the furtherance of the national industry, we now find the Crown entering into secret negotiations for the purpose of attracting skilled foreigners into its own service. Amongst these we may instance the introduction of German armourers, Italian shipwrights and glass makers, and French iron founders. In the absence of any grants recorded in connexion with these transactions, it is impossible to define the precise relations existing between the Crown and the immigrant artisan. The Italian glass makers introduced circa 1550, i.e. under the protectorate of Somerset, were recalled by the Venetian State; but the French iron founders appear to have successfully established in the Weald district the art of casting iron ordnance, which shortly afterwards superseded the older forms of bronze cannon. The Tudor practice, however, must be regarded as a perversion of the mediaeval policy of the encouragement of industry; and it is to other causes that we must look for the reconstruction of the system by Elizabeth, in whose reign the principles of the modern patent system were first distinctly enunciated and carried into practice.

The rise of a capitalist middle class to wealth and political influence in the sixteenth century is ascribed to the disappearance of the old Nobility during the Wars of the Roses and the redistribution of monastic property under Henry VIII. The immediate effect of these changes is seen in the development of the native spirit of speculative enterprise and the rise of the Joint Stock Companies. The first instance, according to Professor Cunningham, of this class embarking in industrial schemes is to be found in the Statute 1 & 2 Phil. & Mary, cap. 14, A. D. 1555. From the preamble of this Act we gather that certain merchants of Norwich had by the introduction of Italian workmen so improved

the manufacture of Russels, Sattens, Satten reverses and fustians, that they were enabled to compete successfully with their foreign rivals. As a reward for their enterprise the merchants obtained a charter with a practical monopoly of the industry, together with other privileges. This class we shall now find undertaking in an hour of need to introduce under the direction of the Crown, but at its own charges, certain industries, the provision of which was considered indispensable for the safety and independence of the Realm. With this preface we propose to leave the grants to speak for themselves. The list, which has been prepared from the Patent Rolls and Calendars, constitutes the first attempt to fix the date of the introduction of the English patent system. It is, moreover, believed to be a complete record of the industrial monopoly licences issued during the period 1561-70<sup>1</sup>.

No. I. 1561. Jan. 3. A lycense to Stephen Groyett and Anthony Le Leuryer to make white sope [for 10 years].

The best English soap of the period was the soft mottled Bristol soap, 'very sweet and good,' but unsuitable for fine laundry work, for which the hard Spanish soap of Castile was largely employed. The grant stipulates that two at the least of the servants of the patentees shall be of native birth, and that the soap, which is to be of the white hard variety, shall be as good and fine as is made in the *Sope house of Triana or Syvile*. The patentees are bound to submit their wares for the inspection of the municipal authorities, and on proof of defective manufacture the privilege is void. The grant appears in full in 'Engineering,' June 22, 1894, with a brief outline of the origin of patent law by the present writer.

No. II. 1561. Aug. 8. License to Philip Cockeram and John Barnes to make saltpetre [for 10 years].

At the date of the grant saltpetre was not manufactured within this country; most of the imported article arriving via Antwerp, a port controlled by the Catholic King of Spain. The Queen therefore bargained with Gerard Honricke, 'an almayne Captain,' to come over and teach her subjects 'the true and perfect art of making saltpetre' as good as that made 'beyond the seas,' stipulating, however, that the secrets of the manufacture should be reduced to writing before the promised reward of £300 should be paid. On the arrival of Honricke the Queen resigned her bargain (Pat. 3 Eliz. p. 6) into the hands of the above patentees, who were both London tradesmen. The specification will be found in full in 'Engineering,' June 15, 1894.

No. III. 1562. May 26. Privilege to George Cobham, alias Broke, for a dredging machine [for 10 years].

The patentee represents that 'by diligent travel' he had discovered a machine to scour the entrances to harbours, &c., to a depth of sixteen

<sup>1</sup> It should, perhaps, be stated that this list has been prepared from an examination of the entries on the Calendars of the Patent Rolls—all doubtful entries having been compared with the Rolls themselves. Its claim to completeness, therefore, rests upon the sufficiency of these Calendars.



feet. The patent is for the importation of a sufficient number of these machines. The rights of scouring channels by the older methods are reserved, and the Queen expresses a hope that her favourable treatment of the patentee 'will give courage to others to study and seke for the knowledge of like good engines and devyses.'

No. IV. 1562. Dec. 31. License to Wm. Kendall to make Alum in Devon, Cornwall, &c. [for 20 years].

In the recital of the grant Kendall represents that he had discovered ores of alum in abundance with a practical method of its extraction. The manufacture was started in Devonshire, but failed. *See under 1564, July 3, Alum patent of Cornelius De Vos.*

No. V. 1562. Dec. 31. Patent to John Medley for an instrument for the drayninge of water [for 20 years].

The recital states that mines of tin, lead, coal, &c., in Devon as elsewhere, were drowned and altogether unoccupied, 'owing the great habundance of water.' It is not clear that Medley lays claim to the invention of the device, although the grant covers all subsequent improvements. The rights of users of old machines are reserved, and clauses are inserted regulating the compensation to be paid for entering upon abandoned properties. In case of disputes arising, the quarrel is to be referred to the Privy Council. The source of inspiration of this and the numerous subsequent patents for mine drainage and water raising will be found in the illustrated work of Agricola published in 1559.

No. VI. 1563. Feb. 26. A license to George Gylpin and Peter Stoughberken to make ovens and furnaces [for 10 years].

In the S. P. Dom. 1565 there is a certificate from some London brewers, who testify to the economy of fuel effected by the furnaces of a German, Sebastian Brydigonne, who may have been connected with the above patentees. The grant refers to the growing scarcity of wood fuel, owing to the large consumption in the brewing and baking trades. The grant is void in case the patentees fail to *come over* and put the grant into practice within two months, or prove extortionate in their charges.

No. VII. 1563. June 22. A license to Burchsard Cranick to make engines for the draining of waters [20 years].

This grant is similar to that of Medley's, but gives some additional powers of entering upon old and abandoned mines under proper restrictions. The engine is stated to have been lately invented, lerned and found out by Cranick, and to be unlike anything devised or used within the realm. Three years are allowed for the patentee to perfect and demonstrate the utility of his engines. Disputes are to be referred to the Warden of the Stannaries and three Justices of the Peace.

No. VIII. 1564. July 3. License to Cornelius de Vos to make Alum and Copperas [for 21 years].

De Vos obtained this grant on the strength of the discovery of ores of alum and copperas (sulphate of iron) in the Isle of Wight (Alum Bay). His

rights were shortly afterwards assigned to Lord Mountjoy, who in 1566 obtained parliamentary confirmation of the grant. Both the Queen and Cecil were originally financially interested in the success of the experiment. In 1571 Bristol merchants complain of the decay of their trade owing to the fact that iron and alum, which had hitherto come from Spain, were now made better and cheaper in this country. See also Stow's *Annals*, 1631, pp. 897, 898; Geological Survey, *Memoirs, Jurassic Rocks*, i. 452-454. The grant confers the right to take up workmen at reasonable wages, together with all materials requisite for the manufacture.

Nos. IX, X. 1564. Oct. 10. Commission to Daniel Houghsetter and Thomas Thurland for mining in eight English Counties.

1565. Aug. 10. Special license to the same concerning the provision for the minerals and mines of gold, silver, &c.

This grant was the outcome of the action of the Queen, who early in her reign sent for expert German miners to revive the mineral industries of the kingdom. Thurland, master of the Savoy, appears to have acted as agent and go-between in the matter. Copper mining, practically a lost art, was at once started at Keswick on a large scale; the metal being required for the casting of bronze ordnance. The validity of the grant was challenged by the Earl of Northumberland on the ground that the work was within the Royalties granted to his family in a former reign. The case was decided in favour of the Queen, on the ground that the neglect of the Earl and his predecessors to work the minerals during seventy years 'had made that questionable which for ages was out of question' (Pettus, *Fodinas Regales*). On May 28, 1568, the Company was incorporated by Charter as the Society of the Mines Royal, which existed down to the eighteenth century. Houghsetter migrated to Cardiganshire, where valuable deposits of silver were discovered, and where he founded a family. See also Col. Grant-Francis, *Copper-smelting*.

No. XI. 1565. Jan. 29. License to Armigil Wade and Wm. Herlle for the manufacture of sulphur and oil [for 30 years] (Latin).

The full text of the grant will be found in Rymer. The sulphur was required for making gunpowder, and the discovery may be attributed to the labours of John Mangleman, a German, who was authorized to search for earth proper for making brimstone (Lansd. MSS.). The second part of the invention related to the extraction of oil from seeds for finishing cloth. The proper machinery for extracting oil from rape and other seeds does not seem to have been known at the period. The grant was subsequently reissued to Wade and another for a further term of thirty years.

No. XII. 1565. April 20. License to Roger Heuxtenbury and Bartholomew Verberick for Spanish leather.

Shoes of Spanish leather, i. e. yellow leather, appear to have been preferred 'to those which shine with blacking' (Howell, *Letters*, I. i. 39). The grant confers an exclusive right of manufacture, and dispenses with the provisions of an Act forbidding the export of leather. On the other hand,

it insists on the employment and instruction of one English apprentice for every foreigner employed, and subjects the industry to the inspection of the Wardens of the Company of the Leather Sellers, who are responsible for 'the skins being well and sufficientlie wrought.' This grant must not be confused with a subsequent license to Andreas de Loo to export felts which gave great offence to the trade.

Nos. XIII, XIV. 1565. Sept. 17. Two licenses to Wm. Humfry and Christopher Shutz to dig (1) for the Lapis Calaminaris, (2) for tin, lead, and other ores.

These grants covered geographically those parts of England not included in Houghsetter's patents and the Alum patent of De Vos. The calamine or zinc carbonate was an essential in the manufacture of latten or brass, which it was proposed to use in casting ordnance (S. P. Dom. Eliz. vol. 8, No. 14). The mineral was discovered in Somersetshire in 1566, and the first true brass made by the new process was exhibited in 1568. The patentees also erected at Tintern the first mill for drawing wire for use in wool-carding. In 1568 the Company was incorporated by Charter as the 'Company of the Mineral and Battery Works,' and remained under practically the same management as that of the Society of the Mines Royal (Stringer, *Opera Mineralia Explicata*). In 1574, and again in 1581, the assignees of the patent obtained an injunction against several owners of lead mines in Derbyshire for using certain methods of roasting lead ores in a furnace worked by the foot blast and other instruments invented by Humphrey after the date of his patent. The Court of Exchequer ordered models to be made, and after repeated adjournments a Commission was appointed to investigate 'the using of furnaces and syves for the getting, cleansing, and melting of leade Ower at Mendype, and the usage and manner of the syve' (Exchequer Decrees and Orders). The depositions in this case are still preserved, but it is impossible to trace the history of the case to its completion. Coke informs us that as regards the use of the sieve, the patent was not upheld on the ground of prior user at Mendip. It is a peculiarity of the grant that it covered all subsequent inventions of the patentees in this particular branch of metallurgy. The hearth was invented after the date of the patent, and one of the questions to be decided was whether a subsequent invention could be covered by letters patent or no.

No. XV. 1565. July 31. License to Francis Berty to put in practice the trade of making white salt.

The patent was surrendered and reissued in the following year.

No. XVI. 1565. Sept. 7. License to James Acontius for the manufacture of machines for grinding, &c. [for 20 years] (Latin).

Acontius was an Italian engineer who had taken out letters of naturalization and was in receipt of a small Crown pension. In 1559 he first suggested to the Crown that a monopoly was the most effectual method of rewarding an inventor. His suggestion appears to have borne fruit in the adoption of the monopoly policy in 1561; but Acontius did not receive his patent until this year. Cf. Antiquary, 1885; Ordish, Early English Inventions.

No. XVII. 1566. Jan. 23. License to Francis Berty for the making of salt.

Berty was a native of Antwerp, and probably introduced the Dutch mode of making salt for fish-curing. The salt was extracted by boiling in copper pans. Plans of the furnaces will be found in P. P. Dom. 1566. The later salt patents of the reign gave rise to great local discontent, owing to the oppression of the patentees, who claimed the right to control the price of salt within certain areas.

No. XVIII. 1567. Aug. 26. A special license to Peter Anthony van Ghemen [for 21 years] to cut iron, save fuel and extract oil.

In the Lansd. MSS. there is a declaration of the inventions of the above individual and his Company. They consisted of a process of tempering iron so that it might be cut into bars for various purposes, and of special mills for corn and for extracting oil from rape-seed, which for want of proper appliances was sent out of the kingdom to be extracted.

No. XIX. 1567. Sept. 8. License to Anthony Becku and John Carré to make [window] glass [for 21 years].

In 1557 English glassmakers were said to be 'scant in the land,' the seat of the manufacture, which was confined to small green glass ware, being at Chiddingfold. The French patentees were assured by the native glass-makers that they were unable to make the foreign broad or window-glass. This patent may be said to have laid the foundation of modern English glass-making; see *Antiquary*, Nov. 1894-May, 1895. It should be noted that the Crown had twice failed to manufacture glass on its own account. The patent insists on the instruction of the English as a condition of the validity of the grant.

No. XX. 1568. Nov. 10. License to Peter de la Croce (De la Croix) to make Cendre de Namour [for 7 years].

A patent for dyeing and dressing cloth after the manner of Flanders. English cloth was still exported in the white, undressed condition to be finished abroad. According to the 'Request of a true-hearted Englishman,' dated 1553 (*Camden Miscellany*), this was due to 'our beastlie blindness and lacke of studyous desire to do things perfectly and well.' But probably the trade was hampered by the absence of the subsidiary industries of oil, alum, &c.

No. XXI. 1569. Apr. 20. A license to Dan. Houghsetter to use the arte of myninge [for 21 yeares].

[See also patent dated Oct. 1564.] The grant is for setting up and using engines for mine drainage.

No. XXII. 1569. May 26. License to John Hastings to make clothes called Frestadowes [for 21 years].

Frisadoes may be regarded as a variety of 'broad bayes,' but of a somewhat lighter character, and dyed and finished for the retail trade. The

patent therefore was essentially for dyeing and finishing cloth. Hastings' suit was supported by the Dyers Company, who reported that if English cloth were dyed within the country the Queen would gain £10,000 annually by the increased custom. The manufacture was established at Christchurch, but Hastings seems to have used his grant vexatiously by wantonly molesting the Essex weavers on the ground that the manufacture of baize came within the four corners of the patent. The matter was referred by the clothiers of Coggeshall to the Exchequer, when they claimed to have gained the day (S. P. Dom. Eliz. vol. 106, No. 47, and Noy, 183). Subsequently an agent of Hastings was brought before the Lord Mayor's Court for trespass, and was fined £9 for molesting a weaver within the jurisdiction of the city (S. P. Dom. Eliz. vol. 173, No. 28).

For the period 1570-1603 a mere summary must suffice. In 1571 Richard Matthew obtained a patent for knife-handles 'made of divers pieces of horn mixed with yellow or white plate,' which obtained for him a lasting reputation. The knives were to be stamped with the half-moon, indicative of their Turkish origin, on the blade and handle. The patent was disputed by the Cutlers' Company, who represented that they ought not to be restrained from using a slight improvement on an old industry, and the patent was not upheld (Noy, 183). In the same year Richard Dyer, an escaped prisoner of the Portuguese, secured a grant for the manufacture of earthen fire-pots, an art which he had learned in exile; his patent was renewed in 1579. In 1574 the art of making glasses after the Venetian fashion was introduced by Verselyn (Antiquary, March 1895) in the Hall of the Crutched Friars. In 1578 Peter Morris inaugurated the house-to-house system of water supply by forcing Thames water by a new engine at London Bridge (Antiquary, Aug.-Sept. 1895). These works continued to exist down to the removal of the bridge in 1822. Amongst patents of minor interest we may note grants for mine drainage, water supply, musical and mathematical instruments, milling machinery, sail-cloth, oils, salt, vinegar, starch, and saltpetre. The mention of these latter articles will be sufficient to remind the student of Elizabethan industry that we are approaching another and less pleasing aspect of the patent system, the main features of which are faithfully reflected in the report of the Monopoly debate of 1601, which has been handed down to us in the Journal of Simon D'Ewes. Into the merits of this agitation, however, we must for the present refrain from entering. The subject is complicated by considerations affecting the commercial rather than the industrial policy of the reign, an analysis of which would unduly extend the limits of this essay. We shall therefore conclude our survey by briefly indicating the chief points of difference in the position of the patentee under the Elizabethan and modern system respectively.

Under the mediaeval system of patent law the Crown naturally regarded itself as the sole patron and arbiter of the destinies of the new industry introduced under the protection and authority of its letters patent. But, with the acceptance by the Crown of the Monopoly policy advocated by Acontius in 1559, the responsibility for the introduction of new industries was by a gradual process of devolution shifted from the Crown to the patentee, upon the faith of whose representations the grant was both drawn and issued. The Queen, nevertheless, unconscious of the revolution which was being effected in the system, asserted and retained to the end of her reign her absolute right of jurisdiction in all cases of dispute arising out of these grants. But to dispute the Queen's licences before the Council or in the Court of Star Chamber or in the Exchequer constituted a risk which few individuals cared to run, as the Courts were apt to regard non-compliance with the requirements of the patentee as evincing a want of respect for the Queen's authority. In 1601, however, this position was challenged by the Houses, and a bill was prepared declaratory of the law upon the subject. This step wrung from the Queen a concession that her grants should be left to the law *without the force of Her Prerogative*; whereupon the bill was dropped. In 1602 the test case of *Darcy v. Allin* was heard; and with this case commences the history of the English common law patent system. Nevertheless, to this day the phraseology of the patent grant bears witness to the existence of that earlier period when patents were granted without application *ex mero motu et certa scientia* on the part of the Crown—when offenders were liable to penalties in the Queen's Court *for contempt of this Our Royal Command*; and when the power of summary revocation was committed to a quorum of six of the Privy Council, because at that period the right to challenge the validity of the royal grants in the Courts of common law had not been effectively established.

'All men of the law know,' said Bacon in 1601, 'that a bill which is only expository to expound the common law doth enact nothing.' Hence the common law rights of the importer remained unaffected by the Statute of Monopolies, which confined the legitimate exercise of the prerogative to the true and first inventor<sup>1</sup>. The choice of language employed by the framers of this statute appears to have been dictated not so much by a desire to restrain unduly the exercise of the prerogative as to avoid lending a semblance of legality to grants

<sup>1</sup> The connotation of the term 'inventor' has been unduly restricted. It is used indifferently in these grants with such phrases as 'the first finder out,' 'discoverer of useful arts,' &c. The word 'invenio,' I come upon, denotes primarily a physical act rather than a mental process. The Act sought to vest these privileges in those who had actually contributed to the introduction of the new art, to the exclusion of Court favourites and others.

which in future might be exercised to the public detriment. Be that, however, as it may, it is clear that, prior to this statute, the Crown and Courts alike recognized two classes of individuals, irrespective of their nationality, as the proper recipients of the royal favour, (1) the bringer-in or importer, (2) the first finder or inventor — the latter grounding his title to favourable consideration on the fact that he possessed in common with the importer the qualification of introducing a new industry within the realm. In other words, the rights of the inventor are derived from those of the importer, and not vice versa as is commonly supposed. A closer examination, indeed, reveals the fact that the inventor's rights were at first regarded as of doubtful validity where proof or probability could be adduced of the invention prejudicially affecting an existing industry; as in the case of Lee's application for the stocking-frame, which is said to have been rejected on the ground that the machine proposed to supersede manual labour. And in 1601, in the discussion on the bill 'for the promotion of good arts,' which proposed to invest in the introducer and improver alike a lifelong copyright of their invention, it was objected that all improvements were not profitable to the state, and that the granting of licences for small additions would breed confusion (D'Ewes, 678), the bill being ignominiously rejected upon the second reading. That the same view was held by the Queen's Courts is shown by two out of the three cases decided prior to *Darcy v. Allin*. In the Derbyshire lead-mining case the claims of the assignees of the patent of Humfry & Shutz were disallowed in the Court of Exchequer on the ground that it was 'easier to add than to invent,' the Court holding that the differences exhibited by the ore-sifting apparatus of the plaintiffs and that used at Mendip were insufficient to support the monopoly. A more important case decided before the Council is known as Matthew's case. The valuable nature of the improvement in Matthew's knife-handles was not disputed by the Cutlers' Company, for they alleged that the monopoly would be the ruin of themselves and their families and apprentices (Lansd. MSS.). The patent was not upheld, on the broad consideration that the object of the system was the introduction of new industries and not the displacement of old. The position of the improver, as is well known, was not finally decided until 1772.

But it is in respect of what constitutes a new manufacture that the divergence of modern patent law from the spirit of the old system is most clearly seen. The Elizabethan policy aimed beyond question, as a perusal of the grants will amply testify, at the introduction of those industries the products of which had hitherto figured most prominently in the list of imports, viz. alum, glass,

soap, oils, salt, saltpetre, latten, &c., &c. Now the proof of a single sale is held to be destructive of the novelty of the invention. So too with the case of disclosure by printed publication. In the sixteenth century the sole test of the monopoly contrary to the law, as defined by Coke, was that the grant should not seek to restrain the public of any freedom or liberty that they had before, or hinder them in their lawful trade. For all practical purposes therefore it was sufficient for the patentee to prove that the industry had not been carried on within the kingdom within a reasonable limit of time to render his grant unassailable on the score of novelty. The tendency of modern legislation to recur to the less exacting standard of novelty may be illustrated in the recent legislation of Germany, Austria, and the amending bill of last session.

On the nature of the patent grant the history of the Elizabethan monopolies throws some new light. The exclusive right of sale, which is supposed to be the kernel of the patent grant, is in point of fact subsequent to and derived from the sole right of manufacture, from which, in the earlier stages of the system, it was by no means an inseparable accident. On the contrary, with the exception of the grant to Verselyn, who obtained an exclusive control over the Venetian glass trade, the rights of the foreign merchant and the discretion of the buyer in the home markets were left absolutely unaffected by the terms of these grants, which, accordingly, must be considered as manufacturing and not as commercial privileges<sup>1</sup>. The statement that what is known as the working clause is unknown to English patent jurisprudence is now no longer tenable. Apart from the frequent insertion of clauses regulating the period within which the new industry was to be introduced, it is obvious that prior to the rise of the patent specification a privilege became void owing to non-working within a reasonable period on the ground of want of consideration. To the clauses stipulating for the employment of native apprentices may be traced the rise of the common law as to the term for which these exclusive licences could be legally granted. The statutory limitation of the term of the grant to fourteen years (Coke even favoured the shorter term of seven years) was avowedly based upon the consideration that the

<sup>1</sup> This point is important in view of recent readhesions to the theory of the patent grant advocated by Collier in 1803. (Cf. Frost, Robinson, and the U.S. Patent Centennial Vol. 1891.) According to Collier the patent is a commercial privilege, or right of exclusive sale, and derives its origin from certain analogous privileges supposed to have been conveyed by the Charters of the Mediaeval Trading and City Companies. It is now accepted that these charters were obtained in confirmation of certain prescriptive rights of self-government which had grown up without direct authorization of the Crown. These charters 'were never accounted a monopoly,' *Darcy v. Allin*, Noy, 182. In the charter of the Hanseatic League, see Anderson's Commerce, vol. i. p. 217.



patent should not operate in restraint of trade. It must be admitted that the Elizabethan grants undoubtedly erred on the side of generosity in this respect.

The occasional reservation of a small rent in compensation for the loss of customs concludes the last of the differences which we have found to exist between the two systems. These rents formed part of the consideration of the grant, whereas the modern patent fees are based upon a rough estimate of the cost of the civil establishment.

Within recent years a country, whose industrial and financial position bears at least a superficial resemblance to the England of Elizabeth, has copied on to its statute rolls a law which reproduces almost in its entirety the features of the Elizabethan industrial system. By the decree of September 30, 1892, the Portuguese authorities are empowered to grant monopolies for the manufacture of any new industrial products within the country, or for carrying out particular mining and metallurgical operations within certain geographical zones. A 'new industry' is defined as one not actually in process of working in the country at the date of the application. The grant does not affect the right of importation or sale of similar foreign products. The system is open to foreigners, and a proof of working is required within a definite period. As to the practical working of the system, little information is available at present; but that the law has not remained a dead letter is evident from the numerous applications made for these concessions, and already there are signs that the provisions of the law will be effectual in attracting foreign skill and capital to the country. The practical working of the system should be carefully watched with the view of its possible application to the fostering of certain colonial industries, the birth of which the bonus system has hitherto egregiously failed to stimulate.

E. WYNDHAM HULME.

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SCOTTISH LAND LAW<sup>1</sup>.

**T**HE late Mr. Robert Louis Stevenson used to tell a good story of an emphatic Southron whom once he met in a railway carriage, and who asserted boldly that there was but one system of law north and south of the Tweed. In vain Mr. Stevenson protested that he had passed examinations in both systems, and was even, in name, a Scottish practitioner. The absurdity of the thing was so evident, that his companion good-naturedly preferred to consider him as a humourist rather than a liar.

Readers of the REVIEW are, of course, many stages ahead of Mr. Stevenson's travelling companion; yet it may be questioned whether the knowledge of Scots law possessed by the average English lawyer goes much beyond the gleanings of the Scottish Appeal Cases, and the hints so freely scattered by the famous Scot who was great as a lawyer, greater as a romancer, and greatest of all as a man. At least the writer of these lines makes no claim to better equipment; and it is as an English rather than a Scottish lawyer that he welcomes Mr. Craigie's admirable volume. Admirable indeed, for though Mr. Craigie professes to write for practitioners only, he has earned also the gratitude of the student, by printing in his collection statutes repealed and unrepealed, and by giving to the word 'conveyancing' its very widest meaning. So that what we really get in his work is a statutory history of Scottish land law; and, with the aid of a few text-books, the English student can gather from it a very fair idea of Scottish land law as a whole.

This is a service to English law as well as to Scots law. For we are just coming to learn how valuable and interesting to English lawyers is the history of their own system; no mean beginning has been made towards the rolling away of that reproach under which we have been content so long to sit, that we, who should of all nations be most proud of our legal history, of all nations know least about it. And as it has been well said, that he who knows nothing but his Bible does not know his Bible, it may with equal truth be claimed that a lawyer who is ignorant of everything outside his own system cannot really appreciate that system as it deserves

<sup>1</sup> Conveyancing Statutes (of Scotland) from the Thirteenth Century to the Present Time, arranged and edited by John Craigie (Edinburgh: William Green & Sons, 1895), 8vo, xvi and 763 pp.

to be appreciated. Wherefore, this being our point of view, Mr. Craigie will forgive us if in these lines we appear to regard Scottish law somewhat as a useful parallel to and illustrator of our own law.

No long study of the volume before us is needed to realize the cousinship (we might almost say the brotherhood) of the two systems, so far as land law is concerned. If in England we find our mediaeval law recognizing the tenures by knight-service, by serjeanty, by frankalmoign, and by socage; in Scotland we see almost the same tenures under their names of ward-holding, blanchferm, mortification, and feu. At once, however, we miss the important English tenure of copyhold, and its absence from the country in which the barony was every whit as real a thing as the manor in England must occasion no small surprise<sup>1</sup>. A conjecture may be hazarded, that in Scotland the settlers whom William's border followers found in possession of the Lowlands declined to accept the villein tenure which the course of events forced upon the English churl, and made good their claims to feu-rights, while in the Highlands the tenacity of tribal customs prevented the formation of manorial groups of cultivators. But, unfortunately, the event is equally consistent with a theory of the total expatriation of the pre-Conquest Lowlanders, for whom, therefore, it was not necessary to devise a special tenure<sup>2</sup>.

Still, this fact is not sufficient to destroy the substantial identity of the two systems. Nor do we attribute any *fundamental* influence to the Roman law, notwithstanding that it appears to be alluded to, and followed, in at least one parliamentary utterance (1540, c. 1) as the 'common law,' and that it has unquestionably left its mark upon the body of Scottish land law. We see the Roman doctrine of 'servitude' struggling with the feudal doctrine of 'estate,' and apparently winning the victory. The Scottish leaseholder owes much of the comparative mildness of his law of distress to the adoption of the Roman notion of hypothec, in place of the feudal idea of seignorial ownership. In the Scottish learning of the liability of heirs for the debts of their ancestors, we trace the undoubted influence of Roman law.

Again, we may fancy Celtic influence in the (to us) peculiar rule of descent by which the heritage (now also the 'conquest'<sup>3</sup>) goes to the next younger, or, failing him, to the next older brother of the

<sup>1</sup> I have even seen the word *manerium* applied by a clerk of the thirteenth century to lands in Fife (*Rotuli Scotiae*, i. 42. 6). But then he was an English clerk.

<sup>2</sup> One may be pardoned for declining, with all due respect, to accept the suggestion of the late Professor Bell that the same right which in England became copyhold, in Scotland survived as 'rentallage' or 'kindly tenure.'

<sup>3</sup> 37 & 38 Vic. c. 94, § 37.

issueless deceased; and, in the 'rentallers' or 'kindly tenants' of the eighteenth century, before alluded to, we have, no doubt, a survival of clan customs.

Once more, the close connexion which long existed between France and Scotland may be suspected of some slight share in the moulding of Scottish law. We may trace it in the proprietary arrangements of spouses, in the organization of the Court of Session, and in the shadow, long surviving, of the *retrait féodal*.

But, in spite of all this, and much else, Scottish land law, like English land law, is, in the main, a body of Teutonic usage, imported by immigrants into a country which formerly knew it not, shaped and moulded by the local requirements of the situation into originality and character, at a later date powerfully affected by the dominant influences of caste and prerogative, then gradually defined and developed by the action of tribunals reflecting more or less faithfully the sentiments of the ruling classes, and, finally, reformed and simplified by the action of a central legislature.

All this makes such points of difference between the two systems, as do undoubtedly exist, the more interesting; for biologists have taught us that it is the minor rather than the major variations of species which are the most fruitful in suggestion. We may, therefore, light upon something of profit, if we institute a short comparison between a few of the parallel features in Scottish and English land law, taking by preference those in which there appears some obvious difference either of chronology or substance.

If, however, we begin by asking which of the two systems was the first to adopt those inevitable alterations of mediaeval practice which both have found to be necessary, in other words, which system may fairly be entitled to the credit of being considered the more advanced or progressive, we are fairly puzzled by a series of apparent inconsistencies. On the one hand, the requirement of writing for a transfer of feudal interests is in Scotland so old as to be undateable<sup>1</sup>, while in England it is not older (as a compulsory rule) than the late seventeenth century. In Scotland there was a general Enclosure statute (doubtful sign of progress!) so early as 1695; in England we relied on commissions and local Acts until 1801. In Scotland the 'limited owner' received statutory powers of management as early as 1770; in England he was tied down by the terms of his settlement until 1856. And this is the more curious, that in Scotland the creation of a binding estate tail, with 'irritant and resolute clauses,' seems to have been hardly possible before 1685, whilst in the south the statute *De Donis*, passed just

<sup>1</sup> The previous state of things is said to survive in the 'udal right' of Orkney and Zetland.

400 years earlier, had for more than two centuries been rendered harmless by the ingenious device for ever associated with the fictitious name of Taltarum<sup>1</sup>. In 1555 (c. 12) we get what may fairly be called a Scottish Agricultural Holdings Act (by the way, Mr. Craigie does not give us this statute), providing against summary ejectment of a tenant, even though the 'ish' has arrived; while the doctrine of 'tacit relocation' must have given the Scottish leaseholder much greater protection than that enjoyed by his English brother, to say nothing of the doctrine of hypothec, previously alluded to, which is undoubtedly a milder form of landlord's right than the analogous English law of distress. The Scottish law of leaseholds is, however, full of puzzles; for while leases were not made binding on 'singular successors' of the lessor till 1449, and could not therefore be strictly deemed real rights before that date, and while it is only of recent years, and still incompletely, that the right of alienation has been won for the leaseholder whose lease does not expressly authorize transmission, leaseholds have become (as they never have done in England) heritable property, and pass on intestacy to the heir, although they are (or were) claimable by marital and fiscal right as movables.

But most startling of all is it to find that dream of English law reformers, the registration of titles, in full realization north of the Tweed, not as the result of modern legislation, which has, in this case, merely improved an ancient practice, but as an inheritance from the Dark Ages. In more than one instance modern England has to pay the penalty for the precocious development of English law. Had our royal lawyers waited for the establishment of their master's courts until the royal law was recognized as universal and supreme, we should not have had two inconsistent systems of Law and Equity, professedly administered by the same ultimate authority, struggling side by side for supremacy during three or four centuries. And the modernness of English law, which so early discarded the materiality of investiture for the metaphysical subtleties of lease and release, turned the course of conveyancing into secret channels; whilst elsewhere the archaic *Auflassung* and the notarial infestment with its register of *sasines* glided easily into a modern *Grundbuch* system of title-registration, without struggle and without bitterness.

On the other hand, Scottish legal history appears in more than one point to have lagged behind our own. With us the feudal doctrine of the non-devisability of land, early sapped by the invention of uses, was practically abolished by statute before

<sup>1</sup> [The name is Taltarum on the roll, and appears to be Cornish: see Mr. Maitland's note in L. Q. R. ix. 1.—Ed.]

the middle of the sixteenth century. But in Scotland, though to some extent evaded by the ingenuity of conveyancers, it flourished even in the present generation; and the English lawyer learns with surprise that it was not before the year 1868 (31 & 32 Vic. c. 101, § 20) competent to a landowner to regulate the succession to his estate otherwise than by a conveyance *de praesenti*. Nay, more, even a conveyance *de praesenti* which altered the succession was liable to be set aside by the heir if not made in 'liege poustie'; the ancient disproof of the charge implied in this *reductio lecti* being the picturesque test of going to or coming from kirk or market unsupported.

Again, in spite of an apocryphal statute attributed to Robert I, Scots law seems to have been long behind our own in according that free liberty of alienation *inter vivos* which is usually (perhaps unwarrantably) accounted the mark of a high civilization. Whether or no the Act of Robert really passed, it is quite clear that for centuries after the English statute of *Quia Emptores* had pronounced its resolute decision on the great alienation dispute, Scottish landowners were seeking by all sorts of methods to evade restraint. For when in 1469 (c. 36) a statute compelled superiors to grant infestment to 'creditor -apprisers,' i. e. as we should say, judgment creditors seeking to enforce their securities, conveyancers were quick to invent a fictitious process by which the intending vendor of lands granted a bond for the amount of the purchase money, and then suffered judgment to be obtained against him upon it, the understanding being that the lands in treaty should be appraised by the purchaser under the statute. The severity of the prohibition is also evidenced by the substantial rights secured by the superior even after its abolition. For the 20 Geo. II. c. 50, the statute which corresponds with the English 12 Car. II. c. 24, while sweeping away the prohibition against alienation, yet expressly reserves all payments and casualties due to the superior on admission of his new vassal.

It is, however, but fair to say that the avowed purpose of the *Quia Emptores*, viz. the prevention of subinfeudation, seems never to have been realized in Scotland, a fact which, if it be a fact, may well account for the comparative indifference to the rule against alienation, strictly so called. For if, to use what we hope is correct Scots, the vassal may grant through a charter by progress a subaltern right to be held *de me et successoribus meis*, he will be the less anxious about his inability to effect a grant original of a public right, to be held *a me de superiore meo*. In fact he will be pleased to create for himself the comfortable incidents of a 'superiority,' and there seems to be no legal objection to his doing so, even at the present day.

We may refer also to the subject of succession, a matter in which,

as is well known, Scots law differs considerably from English. Here it would seem that the praise of merit must be divided. Certainly the Scottish rules, which (at any rate until quite recently<sup>1</sup>) gave the 'heritage' and the 'conquest' in the first instance to different collaterals, which allowed the heir of line no share in the general movables of the deceased until his relations in equal degree had received equal value with himself, and which secured the *legitim* and *jus relictæ* from a testator's caprices, may compare very favourably with the corresponding rules of English law. On the other hand, Scottish law, like the Roman (but with less excuse), struggled long in the meshes of the old theory which identified the heir with his ancestor and made him liable *in solidum* for that ancestor's debts, while it also, like the Roman (and perhaps with more justification), long demanded an elaborate process of 'service and retour' by the heir who claimed his ancestor's lands. Indeed, in this respect, the English law seems to be coming round to the view that it would be well if a dead man's realty were formally granted to his heir by some unmistakable evidence, such as Letters of Probate or Administration, instead of leaving the proof of heirship to future litigation. Nevertheless, it is strange to an English lawyer to find a Scottish statute of the year 1874 solemnly enacting that an heir shall not be liable for the debts of his ancestor beyond the value of the estate to which he succeeds, and a statute only six years older abolishing the mediaeval process of obtaining 'brieves' from the Chancery for service of heirs. And certainly, by its peculiar classification of property into 'heritable' and 'movable,' a division standing midway between Roman and English, the Scottish law did a good deal to accentuate the preference always accorded to sex and 'unigeniture' (if one may coin such a word) by feudalized systems of law.

Needless to say, we find all through Mr. Craigie's book traces of old customs which have played no small part in the development of legal history, and which even now, other-worldly as they appear, are of more than mere antiquarian interest. The right of 'thirlage,' or mill-jurisdiction, seems to have been much more elaborate and persistent in a country in which, even to the present day, agriculture supports a larger proportion of the people than in the more artisan and industrial south. Readers of Chaucer are familiar with the miller who

'Great soken had . . . oute of doute  
With whete and malt, of al the lande aboute,'

and the student of English legal history is aware of the existence, in times past, of the mill franchise. But a first book of English

<sup>1</sup> The change was made, we believe, in 1874 (37 & 38 Vict. c. 94, § 37).

law, written in the middle of the eighteenth century, would not (as Erskine does) have devoted many pages to an elaborate description of the right, with picturesque concomitants of multures, sequels and services, outsucken and insucken, terms which remind us, perhaps, somewhat unpleasantly, of the oppressive feudal rights which were abolished in France by the reforming hand of the first National Assembly<sup>1</sup>. Then, too, there is the fascinating subject of warranty, or 'warrandice,' which, at any rate in land law, carries us back to the time when the lord was really his vassal's protector, and maintained his gifts with the power of the sword. Herein the Scottish law, differing from the English, demanded, and, we believe, still demands<sup>2</sup>, 'absolute warrandice' from every vendor selling for full value; and doubtless there is some better reason for the difference than mere leaning in favour of Roman doctrines. Of the process of outlawry, which, under its picturesque title of 'letters of horning,' played such a great part in Scottish as in other legal history of the Middle Ages, there is much to be learnt. In itself a relic of the time when the royal justice is but a very crude instrument indeed, stronger no doubt, but scarcely more exact than the customary system which it supersedes, it is found so useful that even in civil cases it appears to have been a normal remedy in Scotland till deprived by statute in 1747 (20 Geo. II. c. 50) of its most formidable effects. Not that we would in this particular claim any superiority for the English system which, apparently, used the process of outlawry as a preliminary step in trespass and debt down to the middle of the eighteenth century, when the *capias* and *exigent* seem to have been gradually superseded by the Bill of Middlesex and writ of *Latitat*. Finally, for we must be content to name only a few points, those interested in the still much disputed question of the origin of boroughs and burghage-rights may be advised to turn their attention to Scottish law. In England the comparatively early decay of the peculiar tenure in burghage, and the spread of parliamentary representation, have obscured the very strong case which can really be made out for the royal origin of boroughs; and the theory advocated by the late Dr. Hearn, that only boroughs actually *in manu regis* had, during the first century or two of our parliamentary history, a claim (or a duty) in the matter of representation, has received little support. But when we look across the border, and find there the distinction between burghs of royalty and burghs of regality thoroughly well understood in practice; when it is clearly only

<sup>1</sup> E.g. Blackstone, though he had every temptation, does not seem to mention the right.

<sup>2</sup> See Bell's Principles, § 894, and cases there quoted.



the former which, until quite recent years, have had parliamentary rights and a representative assembly of their own; when we find that, until so late as the year 1874, the borough was really an intermediary between the Crown and the tenant in burgage, constituting a separate entity for registration purposes; then we shall probably be inclined to admit that the theory of the royal or military origin of the borough, lately expounded by Professor Maitland in his criticism of Keutgen's work<sup>1</sup>, receives additional confirmation from Scottish evidence.

It would, of course, be rash to attribute the many differences between two systems so obviously similar in general character to any one cause. But the writer of these lines may perhaps be pardoned if he takes the opportunity of suggesting a point, which he does not remember to have seen elaborated elsewhere, and which has occurred to him as worthy of some little attention.

In almost all cases (and they will be found to cover most of the countries of Western Europe) in which a conquering race has established itself in a territory already occupied by a settled civilization, the invader has found it necessary to establish a new system of courts of justice. And these courts have in due time produced what is, to all intents and purposes, a new system of law. Put the new system of judicature has, practically, to choose between one of two alternatives. It may profess to be *omnicompetent*, or merely *auxiliary*. That is, it may either undertake the administration of justice in all its branches, or it may merely offer special remedies in particular cases. Now, as every one knows, the system of common law courts which was established by the Normans in England, speaking roughly, between 1150 and 1250, was of the latter type. The common law courts at Westminster were not, and never professed to be, what I have ventured to call *omnicompetent* courts. They found existing a system of local tribunals which may fairly so be styled, that is to say, a system of tribunals which professed to declare 'folk-right' in all cases. These courts were too strong to be totally and immediately overridden by a new judicial machinery. And so the king's courts contented themselves with setting up rival jurisdictions in detail, offering superior remedies for wrongs less adequately redressed by the local tribunals, and, in other cases, recognizing as wrongs injuries not so recognized by native law. The result was a curiously one-sided and partial system of jurisprudence. For, as might have been expected, the local courts faded away before the powerful rivalry of the new tribunals, which robbed them of much of their business, while, on the other hand, the original impulse which created the jurisdiction of the royal courts

<sup>1</sup> English Historical Review, No. XLI. p. 13.

seems to have died out just in the moment of victory. Thus, a considerable portion of the field of law was left uncovered, through the disappearance of the local courts and the failure in expansive power of their successful rivals. To cover this ground the only serious attempt made by the common law tribunals seems to have been through the writ of trespass on the case, which, though it ultimately gave us the action of *assumpsit*<sup>1</sup>, the action for malicious prosecution, and other important remedies, can hardly be said to have fulfilled the expectations of the framers of the 24th chapter of the Statute of Westminster II, to which it owed its origin.

The gap was filled, partly by the Courts Christian, but, more effectually, by the Court of Chancery, the connexion between which and the old local courts, whose relinquished places it largely filled, has never been adequately worked out, though hints of its existence have from time to time been dropped<sup>2</sup>. At first, the Court of Chancery appears to have started on a career of omnicompetence, fettered only by its unwillingness to provide a duplicate remedy where one already existed at the common law. But even Chancery seems before very long to have become, if not a formulary, at least a precedent-bound tribunal (its failure to secure the jurisdiction in copyholds, which it obviously coveted, is a proof of its declining strength); and so England was again left without any court which professed to deal with the province of law as a whole.

The course of Scottish jurisdictional history was very different. Whether or no there were ever in Scotland any national courts corresponding with the old English moots of the hundred and shire, seems to be an open question<sup>3</sup>. But there appears to be little doubt that the movement which, in England, converted the sheriff into a purely royal official with vast jurisdictional powers, spread over the border, and produced similar effects in Scotland<sup>4</sup>. The existence of the sheriff is clearly recognized in the Ordinance for the Government of Scotland issued by Edward I in 1305, wherein twenty-five Scottish sheriffdoms are enumerated. Only, and here the important difference comes in, there appears to have been in Scotland nothing to correspond with that harrying of the sheriff, and his decline and fall, which are such marked features of the thirteenth century in England, and which ultimately succeeded in reducing the county court almost to the position of a shadowy background for the

<sup>1</sup> If the common law courts had recognized the action on the simple contract in the fourteenth century, they might have secured the jurisdiction in *uses*; for a *use* is, after all, a contract.

<sup>2</sup> E.g. by Sir Edward Fry in his preface to the third edition of his book on *Specific Performance*.

<sup>3</sup> See Dove-Wilson, *Sheriff Court Practice*, Historical Introduction.

<sup>4</sup> Probably the process resembled that which took place after the conquest of Ulster at the end of the sixteenth century.

sessions of the itinerant justices. In Scotland the sheriff kept his power undiminished in degree, though doubtless he suffered in a way by the lavish creation of *régalités* or feudal jurisdictions, which the weakness of the Scottish throne at a critical period was induced to sanction; and the 'judge-ordinary,' as he came to be called, presided over a tribunal which could take account of most civil and a good many criminal cases. Hence, there was in Scotland no pressing need for the establishment of a central court of justice; especially as the itinerant justiciars, who went through the country 'on the grass and on the corn' (i. e. in spring and autumn), disposed of the heavier criminal cases. And, as a matter of fact, no such central court was created till the sixteenth century. For we cannot regard the parliamentary Court of Session which existed from 1425<sup>1</sup> to the end of the fifteenth century as a professional court of justice.

But, apparently, at the beginning of the sixteenth century it was felt that the local jurisdictions of the sheriffs required supplementing by a strong and authoritative central tribunal, and in the year 1503 a statutory attempt was made to create a '*consale . . . quhilk sall sit continually in Edinburgh or quhar the king maketh residence or quhar he pleseth to decide all maner of sumonds and civil maters complants and causes dayly.*' This particular attempt appears to have been unsuccessful, doubtless owing to the premature death of James IV at Flodden Field, and the long minority of his son. But, on the latter's assumption of the reins of government, one of his first measures was (by statute 1532, c. 2) to institute a '*College of Justice*,' consisting of fourteen persons, '*half spirituale half temporall*,' and to give them power to '*sitt and decyde upon all actionis ciuile.*' Apparently, the new body worked well, for its existence was formally ratified by a statute of the year 1540 (sess. 2, c. 10), and it was ordered to '*remane perpetualie for the administratioun of Justice to all the liegis of this realme.*' Moreover, the praetorian power was conferred on it of making Acts, statutes, and ordinations for ordering of process and hasty expedition of justice; and the long list of Acts of Sederunt, no less than many other of its works, attests the administrative, as well as the judicial, authority of the Court of Session.

Now it is very clear that courts such as those of the sheriff and the Session will take a view of their position widely different from that adopted by courts constituted as were the English common law tribunals. The latter, having no established system of law to guide them (for the Anglo-Saxon *customals* must have begun

<sup>1</sup> By virtue of 1425, c. 19, and other statutes. It was really a Committee of Parliament.

already to appear out of date), and, doubtless long bearing in mind the originally subordinate character of their office, confined their attention to the hesitating process of writ-invention, or, it may be, in all except a few instances, of obeying writs invented for them by others. One apparent exception to the truth of this generalization exists. The doctrine that no man need answer for his freehold without a royal writ, though but procedural, is worthy of being called a principle. But the rule dates from the time before the common law courts, as courts, really existed, and is rather a governmental than a judicial rule. Speaking generally, a pious horror of anything that can possibly rise to the level of a principle has been one of the most conspicuous characteristics of the English common law courts, from their creation to the present day.

No such narrow spirit cramped the action of the Scottish courts. As was natural, the very width of their jurisdiction gave them a receptiveness foreign to their English contemporaries. Being unable to fall back upon the timid *non possumus*, they were constrained to admit all kinds of inspiration. Whatever be the sources of the *Quoniam Attachamenta* and the *Iter Camerarii*, it is now pretty generally accepted that the *Regiam Majestatem* is a free paraphrase of Glanville's *Tractatus*; and it is not a little curious to observe that, in the Scottish paraphrase, the forms of writs which, in the original treatise, form so conspicuous a feature, are almost entirely omitted, so that 'The Majesty' appears as a statement of principles rather than as a mere body of directions to practitioners and officials. Likewise, the willingness of the Scottish courts to own their indebtedness to Roman and canon law stands in pleasing contrast with the professed hostility of the English tribunals; and it is not without significance, for example, that the *actio spoli* of the canonists, which, in England, is disguised and warped into the writ of novel disseisin, in Scotland is freely naturalized as the action of spuilzie. Other instances of receptivity might be quoted, but one shall suffice, taken this time from general Teutonic law. It is fairly well known that the continental Germans had, before the close of the ninth century, arrived at a very complete process of getting at landed property to satisfy the debts of its owner<sup>1</sup>. Briefly put, the process consisted in outlawing the defendant by means of the king's ban, and then seizing his property in the name of the Crown, which satisfied the creditors as an act of grace. Whether this process ever reached England, it is difficult to say; but it is pretty clear that, if it did, the feudal dislike to land alienation soon rendered it inoperative as a general

<sup>1</sup> The details are worked out by the writer in an article published in the English Historical Review, No. VIII. p. 417.

remedy, though it may possibly survive in the peculiar process open to the Crown for enforcement of its claims. Accordingly, it would seem that the ordinary creditor had no remedy against his debtor's lands (at least in his lifetime) until the statutes of Edward I gave him the writ of *elegit* and the rights of merchant and staple, which were, of course, very imperfect remedies. But the Scottish courts must have boldly adopted the Carolingian rules, for we find a statute of Alexander II directing that, on failure of the debtor to satisfy his creditor within fifteen days, 'the schiref and the king's servants sall sell the lands and possessions pertaining to the debtor, conform to the consuetude of the realm,' while it required an express statute of 1469 (c. 36) to protect even the goods of tenants against their lord's creditor. And the process of 'apprising,' introduced by this latter statute, gave the creditor the power (ultimately abused) of taking the lands themselves, if no purchaser could be found.

With the absence of trial by jury also, which found no place in Scottish civil procedure till 1815, the constitution of her courts must have had much to do; but limits of space forbid further illustration of a point which is not intended as an assertion, merely as a hint towards the explanation of some otherwise puzzling differences between two fundamentally similar systems. When we find on the one hand a group of courts which really in their origin were little more than administrative travelling commissions, bidden to execute certain instructions, we shall not be surprised if these courts become pedantic and hesitating, eager for precedent to sanction every step, looking for guidance rather to exact *formulae* than to elastic principles, anxious to disclaim all power of law-making. And we shall not be surprised if the law which they administer betrays similar characteristics. On the other hand, when we find a system of courts inheriting an indefinable authority from custom or endowed with general jurisdiction by statute, we may expect to see them bolder in their application of principles, more open to outside influences, less deferential to precedent<sup>1</sup>, willing to strain their process of law-making to the utmost<sup>2</sup>; and we shall be justified in looking for corresponding features in the law which they administer.

Finally, we can only regret that such an interesting and suggestive book as that compiled by Mr. Craigie should be rendered of comparatively little value by the absence of an index.

EDWARD JENKS.

<sup>1</sup> Erskine, writing in the eighteenth century, expressly denies that precedents are binding, even on inferior courts (Bk. I. tit. i). Imagine Blackstone propounding such a doctrine.

<sup>2</sup> Many of the Acts of Sederunt deal with large questions of law.

## INDICTMENTS.

I SUPPOSE that it will be generally admitted that legal technicality of the old-fashioned kind finds its last stronghold in the criminal law, and practically centres round the construction of the indictments. I am not concerned to discuss at this moment why this is so, beyond pointing out that the fact is due in a large measure to one of the fundamental principles of the criminal law as at present administered, namely, that the prosecution can win only on the law and the merits, whereas the prisoner may get off on either. But I wish as far as possible to look forwards rather than backwards and to give reasons for believing that some of the most objectionable technicalities at present to be found in indictments are due to mere superstition, and might be abolished by the action of a sufficiently strong-minded draftsman. The point is of the more importance because as years go by it becomes more and more obvious that no real help in the matter can be expected from the Legislature. The reduction of indictments to a form which, apart from the technicalities of the law itself, would leave nothing to be desired, is a very simple feat to a competent draftsman. I need not recapitulate the efforts to bring about this end which have been made in the last twenty years; but taken with the general success of the very simple system of written accusations now obtaining in the case of offences tried summarily, they seem to show that the blame for the present state of things lies rather with the Legislature than with the lawyers. Since 1851, in fact, the Legislature has been almost absolutely quiescent in the matter. It has indeed interfered in two methods, one by allowing the offence to be set out in an indictment in the terms of the enactment by which it is constituted, the other by allowing a man indicted for one offence to be convicted of another. Neither of these principles have as yet received very wide application; personally I think both are unsound, although I am not unmindful of the thirty-ninth section of the Summary Jurisdiction Act, 1879. In the first case simplification of expression is procured by omitting to inform the prisoner of something which he has a right to know. For example, in an indictment under the Debtors Act of 1869, it is sufficient to describe 'the offence charged' in the words of the Act, and consequently it has been decided that a man may be

accused of obtaining credit by false pretences without being told what the false pretences are; and he might, I suppose, be accused of making a false entry in his business books without having it described to him. This seems to me to be distinctly contrary to justice, as although the accused is under such protection as is afforded by the Vexatious Indictments Act, it is quite open to the prosecutor to conceal the whole of his case till the moment when he begins to prove it. As regards the second case, I do not say that any unfairness is done at present; it may be right that a man who is accused of rape should be liable to be convicted of other somewhat similar offences; but the principle is a slovenly one, and as soon as it is made use of, as it may be at any time, to accuse a person of a more, in order to convict him of a less, serious offence, it will inflict very serious injustice.

Meanwhile what have the lawyers been doing to simplify matters? As regards indictments, besides proposing schemes requiring legislation, they have, I am ready to admit, not done as much as they might. They have in fact not yet taken all the advantage that they might take of such assistance as the Legislature has afforded them; a draftsman's first duty is to draft for safety, and if the old forms to be found in the proper places do not afford means of stating to the prisoner what is the crime of which he is accused, they are at all events likely to defy the ingenuity of his counsel. But two causes are at work among lawyers, which will, I think, end in making it possible to effect a very considerable change in the language in which indictments are couched without any help from the Legislature at all. In the first place there is a growing impatience of the technicalities of the criminal law, both at the Bar, where they are held to be disliked by the jury, and by the Bench, where it may be that their full beauty is not always appreciated. How far we have travelled in this direction may, I think, be shown by a reference to Frost's trial in 1839. Frost was tried for high treason on account of the share he took in the famous Newport riots. He was defended by two future law officers and Chief Barons, Pollock and Kelly. They began by threatening to sever their challenges and thereby forced the prosecution to try Frost without his associates, they objected to the jury being called in alphabetical order, and discussed the right of the prosecution to peremptory challenges under 6 Geo. IV. c. 50 till the end of the first day. The greater part of the next day was taken up by a dispute as to the proper delivery of a list of witnesses to the prisoner, at least three witnesses were examined on the *voir dire* to prove their misdescription, the conviction was eventually nearly nullified on the point as to the prisoner's list of witnesses, and

Pollock frequently took an opportunity to explain that he was really quite unfamiliar with the criminal law. Of course all the points he took would not be open to defending counsel to-day in any ordinary felony or misdemeanour; but I cannot imagine what would happen to a man who spent a day and a half in preliminary objections. I have never heard challenges severed any more than a challenge to the array. I have even been seriously rebuked by a most experienced judge for exercising my right to peremptory challenges in a sheep-stealing case tried in Wales. From these and other similar signs of the times it is safe to say that technicalities are unfashionable. But there is another reason for their decay, and that is sheer ignorance. A 'local description' is still necessary in certain cases, and it seems that its want cannot be cured by amendment, but I do not believe there are half a dozen men who would say off-hand what these cases are; an indictment must still be framed with 'certainty to a certain intent in general,' but what that expression means, except in very general terms, I do not believe that any living man either knows or cares. The fact is that, as a leading authority on the subject writes, 'the effect of these complicated and narrowly guarded amendments (i. e. those effected by the statute of 1851) was to leave the greater part of the law relating to indictments in a blurred, half-defaced condition, like a slate the greater part of the writing on which has been half rubbed out. . . . A general impression has been produced that quibbles about indictments have come to an end. It has ceased to be the fashion to make them, and if they are made they do not succeed.'

Under these circumstances I think that the time has safely come when a competent draftsman, having enough faith in his predecessors to believe that their pedantry was a descendant of sound sense, and in his ultimate judges to believe that they would sympathize with the spirit of his adventure, might venture to write indictments more or less in the language, say of the local official of to-day, and to make it nearly as plain to the ordinary citizen what the crime is of which he is accused, as does the rate-collector what is the sum which he is expected to pay for his rates. Two great principles, as I understand the matter, underlie all the learning that has ever existed as to indictments. In the first place, all the legal essentials of the alleged crime must be so set out as to distinguish it from any other; in the second place, the alleged facts constituting it must be described with enough exactness to support a plea of *autrefois convict* or *autrefois acquit*, according to circumstances. In other words, the prisoner should have notice of all the law and all the facts which will be cited against him. In considering



how this may be effected more satisfactorily than it is at present, I will first consider the more formal matters and then those of more substance, concluding with an example which will explain my meaning more than many precepts.

A leading question arising on nearly every indictment is how far words of art can safely be restricted; and the law being as it is, and for our purposes being presumed to be immutable, it is obvious that 'feloniously' and 'unlawfully' must keep their places to let the prisoner know clearly whether he is accused of a felony or a misdemeanour. The distinction is probably a matter of absolute indifference to him and everybody else, except possibly the jurymen, who run the risk of being locked up all night if the case is one of felony; but it must undoubtedly be made, and it may be argued in its favour that the word 'unlawfully' has been held to supply that negative to all legal exceptions to the guilt of the accused, which formerly often had to be so laboriously expressed in the case of summary convictions, and 'feloniously' has, I presume, the same effect. In regard to other conjuring words which are used for purposes quite irrespective of their meaning, the case is rather different.

As George II followed Elizabeth's example in providing a punishment for 'wilful and corrupt' perjury, I suppose that we must still allege that perjury was committed wilfully and corruptly, and can only regret that those monarchs did not restrain their language; 'embezzle' too is necessarily a sacred word, but in these cases the conjuring words are really no more than tags by which an accused man may, most inefficiently, be warned of the statute which will be invoked against him. On the other hand, in the case of common law offences, even when made punishable by statute, such as larceny and burglary, I doubt whether it would now be held necessary to amplify the technical word by applying its definition. 'Larceny' is a substantive to which the corresponding verb is 'to steal,' and stealing is rightly described as feloniously taking and carrying away. We must allege the felony in any case, but I believe that an indictment alleging that a man 'feloniously did steal' a watch would be good without alleging that he took and carried it away; and if any pleader regards my view as sacrilegious, I can quote the Year Books to prove that "*furat*" *fuit unum equum* 'is bad, apparently only because 'felonice' is omitted, and Coke to show that '*felonice cepit et asportavit*' is good. The characteristics of burglary are well enough known to make a tiresome repetition unnecessary; as the particulars of the offence committed, such as some description of the house broken into, the time of the offence, and the felony which the prisoner intended to commit must all be given, and as

such detail is not only required by decided cases, but also by the principle of disclosing the facts of the alleged offence, it may be that it is impossible to avoid supplementing a technical word by its definition. But in the case of assault it is difficult to see why it should be considered necessary to add to a charge of attempting a battery, which is technically what an assault amounts to, a description of the battery itself, which is usually false. It is an offence to commit an assault; why then go on to charge that the accused did beat, wound, ill-treat, and do other wrongs to his victim, of the first three of which charges two are probably untrue, while the fourth is no crime? Such a statement seems to be always useless, and in the case of indecent assault may be actually misleading.

To any one familiar with indictments it is impossible to doubt that a good deal of their obscurity is due to the natural tendency of man to indulge in mere phrases. Though fifty years ago it was necessary to have recourse to the Legislature to enable draftsmen to omit such phrases as 'not having the fear of God before his eyes,' or 'at the instigation of the Devil,' as statements the truth of which it was not necessary to prove, I believe that simplicity of language is sufficiently valued by members of the High Court to make it possible to omit all archaic language from indictments so long as the two leading principles I have maintained above are scrupulously observed.

Simplicity of statement, however, does not depend merely or chiefly on the excision of archaisms. I believe that the High Court to-day would scornfully refuse to require any degree of certainty in an indictment higher than the lowest, namely certainty to a common intent, that is that they would read into the indictment any allegation which according to the common use of language it must reasonably be held to contain. This not only enables the pleader to discard 'the said' and such expressions in nine cases out of ten where they are now used, but enables him to attach a force to such words as 'falsely' and 'knowingly' which they deserve, and may in some cases enable him to omit a repetition of averments which is the feature which makes the longer forms of indictment the unintelligible nonsense that they are. I am aware that in the face of a decided case more than eighty years old I cannot seriously suggest that the word 'falsely' as it is ordinarily used in an indictment for false pretences has any meaning in law; I may allege that *A* knowingly and falsely pretended three things, but *R. v. Perrott* decides that I do not thereby allege that *A* falsely pretended any one of them, so that it is necessary for me to aver that the pretences are false and that *A* knew it. I know however of no

authority which prevents my making my averment in the lump, and I believe both that such an averment would be good, and that there would be a considerable chance of the High Court so holding it. Fortunately the action of the Legislature since the decision in *R. v. Perrott* gives strong ground for saying that that case does not apply to perjury, though it is decided on the analogy of the perjury indictments of that day, and of this fact I have taken full advantage below. I believe it is still the custom to conclude perjury indictments with a conclusion which is in fact merely a quotation from a statute, so as to bring the case within the protection of the Criminal Law Act, 1826, according to which the description of a statutory offence in the words of the statute makes an indictment good after verdict: I do not think that this slavish custom has been followed in other cases, and authority to show that it is unnecessary is plentiful. Other alterations in the framing of indictments are easily conceivable which are trifles in themselves, but which, taken together, seem to me to make all the difference between a document which is readily understood by all the world and one which is practically unintelligible to any one but an expert. It is difficult to explain what these alterations are, so I will try to make my meaning clear by giving an example of what I believe to be a good indictment for perjury, premising that I take the facts out of an authoritative book of precedents, while they are embodied in a document containing 1155 words, as against 298 in the following:

The County of Lancaster to wit.—The Jurors for our Lady the Queen upon their oath present that T. S., on the 20th day of December, 1894, unlawfully did commit wilful and corrupt perjury against the form of the statutes in such case made and provided, and against the peace of our Lady the Queen her crown and dignity; the facts of the case being as follows.

On the day referred to an information against S. K. for an offence against the Licensing Acts 1872 and 1874, namely selling intoxicating liquors on licensed premises at Bartonwood on Sunday the 11th of December, 1894, during prohibited hours, came on to be tried before a Court of Summary Jurisdiction sitting at Bartonwood, and was so tried in due course.

On the case being heard, T. S. having been duly sworn, swore and deposed as follows: 'I was never in the house (meaning thereby the licensed premises aforesaid, occupied by S. K.) at all that day (meaning thereby Sunday the 11th of December, 1894), and never saw the policeman (meaning J. T.) before in my life. I never was in Bartonwood (meaning Bartonwood in the said county) at all that day (meaning the Sunday aforesaid). I had not been in it (meaning Bartonwood aforesaid) for a fortnight before that day (meaning the Sunday aforesaid).

All these statements made by T. S. were untrue, as he knew when he made them, and he made them falsely, wilfully, and corruptly.

Whether S. T. was in the said house on the 11th of December, 1894, whether he had seen J. T. before that day, and whether he had been in

Bartonwood for a fortnight before that day, were questions material to the issue which the Court of Summary Jurisdiction had to decide on the hearing of the charge in question.

I think the foregoing is a fairly plain description of an offence, and that it is good as an indictment. At any rate without going into detail I submit it to the criticism of anybody who cares to take the trouble to examine it. I might have made it shorter still keeping within the bounds of the law, but there are some matters of which I have felt bound to give T. S. notice, though he is not strictly entitled to it.

Some of the changes I have suggested to my fellow craftsmen may be inconvenient, some may be actually wrong; and I do not expect that any one will be found bold enough to adopt them all at once. Some things are beyond our powers; we must vary our counts in such a way as to confound one another if possible so long as the law remains what it is, and we can no more combine misdemeanours and felonies than perform any other impossibility. But by remembering and observing the law we know, and by discouraging others from inquiring into the law which we have all happily forgotten, I believe we are capable of doing much to bring about a change which during twenty years the Legislature has shown itself incapable of effecting.

H. L. STEPHEN.

‘EXECRABILIS’ IN THE COMMON PLEAS.

TOWARDS the middle of Edward III's reign, just when the national movement against papal ‘provisors’ was coming to a climax, the king's legal advisers and the justices of the Court of Common Pleas took upon themselves to enforce a certain papal constitution, though to enforce it in an odd, lopsided fashion, favourable to their royal lord. The pope's weapons were to be wrested from his hand and used against him. The king was going to take possession of a great deal of ecclesiastical patronage which the pope had destined for himself. This clever move is partially revealed to us by certain discussions in the Year Books, which have never, I believe, been fully explained because they have never been compared with the plea rolls.

The constitution in question was none other than the famous *Execrabilis*, which fills a prominent place in the constitutional history of the Catholic Church. It is one of the stock examples of those covetously fiscal ‘extravagants’ which are characteristic of the Avignonese papacy. For some time past popes and councils had been legislating against pluralism, that is, against the simultaneous tenure by one clerk of more than one benefice involving a cure of souls<sup>1</sup>. Among the laws striking at this evil was a canon of the Fourth Lateran Council (1215), which began with the words *De multa*<sup>2</sup>. This canon is here mentioned merely because a tradition among English lawyers taught, and perhaps still teaches, that a reference was made to it in the cases which are to come before us; but we shall hereafter see that this tradition has its origin in a mistake. Legislation, however, was futile. The popes themselves made it futile by their dispensations, and those who do not like popes tell us that the laws were made in order that they might be dispensed with. At last, in November, 1317, John XXII issued a long and stringent constitution whose first word was *Execrabilis*<sup>3</sup>. It was stringent; it was retrospective; it attacked those clerks who were already holding several ‘incompatible’ benefices, even though they had obtained dispensations. Such a clerk was, within one month

<sup>1</sup> For a full historical account of the law see Hinschius, *Kirchenrecht*, iii. 243 ff.

<sup>2</sup> *Conc. Lat.* IV. c. 29; c. 28, X. 3, 5.

<sup>3</sup> c. un. in *Extrav. Joan.* XXII. 3; c. 4 in *Extrav. comm.* 3, 2.

after notice of this constitution, to resign all but one of his benefices, or else they were all to be vacant *ipso iure*. There were prospective besides retrospective clauses, and finally there was a clause in which we may, if we like, discover the legislator's main motive. All the benefices vacated by the 'cession' of the pluralists were 'reserved' to the pope, or, in other words, it was for him to fill the vacancies. This constitution was no idle word in England. In the next year we can see Pope John busily at work collating clerks to English benefices which have been vacated by the force of *Execrabilis*<sup>1</sup>. The English king was weak and worthless, and apparently the Holy Father was allowed to have his way.

A little later Edward III was on the throne, and the outcry against 'provisors' was swelling. At this moment some of the king's lawyers seem to have caught at the idea that two could play at *Execrabilis*, and that, while the 'reservation' was studiously disregarded, the main provisions of the bull might be enforced with advantage. It will be remembered that the amount of patronage that fell to the king's share was very large. To say nothing of the churches that were all his own, he exercised the patronage of infants who were in ward to him, and also the patronage annexed to bishoprics that were vacant. So any measure which emptied churches might do him a good turn and enable him to pay his servants.

In 1335 the king brought a *Quare impedit* against the bishop of Norwich for the deanery of Lynn<sup>2</sup>. The king stated in his count that John, late bishop of Norwich [that is John Salmon who died in 1325], had conferred the deanery on one Master Roger of Snettisham, who was already parson of the church of Cressingham, and who continued to hold both benefices for more than a month after his installation in the deanery, 'per quod per constitutionem de pluralite predictus decanatus vacavit ipso iure,' and remained vacant until the temporalities of the bishopric of Norwich came into the hand of Edward II upon the death of bishop John. To this declaration the bishop demurred in that polite form in which we demur to the pleadings of kings. He said that he did not understand that the king desired an answer to the said declaration, 'for therein he does not allege that the said deanery was vacant *de facto* in such wise that this Court might take cognizance of the vacancy, but merely alleges that it was vacant by the constitution against plurality, which does not fall within the cognizance of this

<sup>1</sup> Calendar of Papal Letters, ii. 172-182.

<sup>2</sup> De Banco Roll, No. 305, Hilary 10 Edw. III. m. 214 dors. An earlier stage on De Banco Roll, No. 303, Trinity 9 Edw. III. m. 236. I have to thank Miss Salisbury for searching and making extracts from these rolls.

Court.' So the bishop craved judgment. The king replied that by the constitution against plurality the deanery must be adjudged to have been vacant *de iure* just as though the dean had been deprived thereof by sentence. So the king craved judgment. Here the record ends, and no more of the case has been found.

So much from the roll. In the Year Book we have discussion<sup>1</sup>. After some little fencing over the question whether the king ought to say that a 'bishopric,' or merely that the 'temporalities of a bishopric' are in his hand when there is no bishop, the serjeants come to the main matter. For the bishop it is said, 'Sir, you see how the king takes as the cause of the voidance the constitution touching plurality, and shows nothing that lies in any fact which would give cognizance to this Court, such as resignation, privation, death or succession.' Parning, who is arguing for the king, replies, 'The constitution touching plurality was made by a general judgment that all should be deprived who held their *beneficia curata* for more than a month after the constitution, and this binds them more firmly as regards privation than a judgment that some certain person should be deprived, for the one might be afterwards annulled upon appeal; not so the other.'

The Year Book, like the roll, tells of no judgment. Probably the king and the bishop came to terms. We can, I think, see that the king's advocates had rather a difficult course to steer. They were proposing to enforce a papal constitution directly and without any certificate from the English ordinary. What might they not have on their hands if they once began to administer the 'extravagants' of Avignon? Parning's argument seems to be explicable by the retrospective character of *Execrabilis*. This, he urges, is 'a general judgment.' If a particular judgment of deprivation were given against a clerk and were certified to this Court, you would hold that the benefice was vacant. Well, here is a general judgment and one that is subject to no appeal. That the constitution in question was *Execrabilis* and not one of the earlier decrees (for example *De multa*) would, I believe, be clear even from this case, because of the mention made of the one month which is given to the pluralist for the resignation of his superabundant benefices. Happily, however, this is put beyond all doubt by the enrolled record of the next case, though it is left dubious in the Year Book.

In 1351, John of Gaunt, on behalf of the king, brought a *Quod permittat* against Simon Islip, archbishop of Canterbury, for a presentation to the church of Wimbledon in the county of Surrey<sup>2</sup>. The king's declaration stated that Robert of Winchelsea, archbishop

<sup>1</sup> Y. B. 9 Edw. III. f. 22 (Trin. pl. 14); Y. B. 10 Edw. III. f. 42 (Hil. pl. 3).

<sup>2</sup> De Banco Roll, Mich. 25 Edw. III. m. 41 dors.

of Canterbury, being seised of the advowson, collated John of Sandale in the eleventh year of the reign of Edward II, and that because Pope John, in the second year of his pontificate (Sept. 5, 1317-1318) and the ninth year of the said reign (July 8, 1315-1316)<sup>1</sup>, made a certain constitution called *Execrabilis*, to the effect that no clerk should occupy two *beneficia curata* beyond one month after the publication of the said constitution without being deprived *ipso iure* of both benefices, which constitution was published in the said year of Edward II, and because the said John of Sandale occupied the church of Wimbleton and various other churches [which are named] for days and years after the said publication, the said church of Wimbleton by virtue of the said constitution became vacant, and remained vacant until the temporalities of the archbishopric came into Edward II's hands by the death of archbishop Robert, and so the right to present a clerk pertained to Edward II, from whom it descended to the now king.

Pausing here for a moment, we may remark that to us who are blessed with books of reference, the king's story is obviously false, for Robert Winchelsea was dead, and Walter Reynolds had succeeded him at Canterbury some time before the publication of *Execrabilis*. But we must not allow this brutal matter of fact to spoil a discussion of matter of law. We learn from the Year Book<sup>2</sup> that the counsel for the archbishop were at first inclined to demur. The king, they said, founds his action on a matter that does not lie in the cognizance of this Court, and we do not think that this Court will take cognizance of a matter which ought to be pleaded in Court Christian. This was a very intelligible line of defence: it is not for the Court of Common Pleas to enforce directly a law against plurality. However, we are told that the archbishop's counsel dared not demur at this point, since if the Court was against them they would be allowed no other defence. So they, as both the report and the record show, traversed the king's statement that the church of Wimbleton fell vacant while the temporalities of the archbishopric were in the hands of Edward II. This is the plea that is upon the roll, where no notice is taken of the abortive demurrer. A jury was summoned and gave the king a verdict. The jurors said upon their oath that after the publication in England of the constitution called *Execrabilis*, for some six weeks and more, John of Sandale held the church of Wimbleton and certain other churches that they named, that thereby the said church became vacant, and that it remained vacant until by the death of archbishop Robert the temporalities of the archbishopric came into the hands of Edward II.

<sup>1</sup> The slight discrepancy in the dates will be noticed.

<sup>2</sup> Y. B. 26 Edw. III. f. 1 (Pasch. pl. 3).



Judgment was given that the king should recover his presentation and that the archbishop was in mercy<sup>1</sup>.

On the roll this judgment is followed by a remarkable writ dated April 22, 1352. Much to our surprise the king confesses that he is now informed that the title to the presentation which he had successfully urged was feigned and untrue (*fictus et non verus*), and that the church did not become vacant while the temporalities of the archbishopric were in his father's hand. Therefore he revokes his presentation of a certain William of Cheston, declares that the judgment is not to be enforced, and forbids that the archbishop should be further molested. This writ comes to us as a surprise, for though, as already said, we happen to know that the jurors' verdict must have been false when it supposed that Winchelsea's death occurred after the publication of Pope John's constitution, still we are hardly prepared to see Edward III quietly resigning the fruits of a judgment. The interesting feature of the case, however, is the proof that the Court of Common Pleas was prepared to put in force one half of the notorious extravagant, and this without requiring any sentence of deprivation pronounced by an English ecclesiastical court. The pope had said that in a certain event a benefice was to be void; void therefore it was, for the pope had power to make laws and even retrospective laws against pluralism. On the other hand, no word is said in record or report of the other half of the bull, for a 'reservation' is plainly an attempt to touch that right of patronage which is a temporal right given by the law of the land, and such an attempt is *ultra vires statutis*. The pope's law may turn an incumbent out, but, the church being vacant, the patron can exercise his right of presentation. A very pretty plan! But what would the English prelates say?

We can now understand a petition that the clergy presented to the king in the Parliament of 1351<sup>2</sup>. Probably it was occasioned by the action directed against the archbishop. 'May it please you to grant that henceforth no justice shall hold plea of the vacation of any benefice of Holy Church by reason of insufficient age, consecration as bishop, resignation, plurality, inability, or other avoidance *de iure*, for no such avoidance lies or can be in the cognizance of lay folk; but if our lord the king desires to take advantage of any such avoidance *de iure*, let a mandate be sent to the archbishop or bishop of the place where the benefice is, bidding him inquire touching this matter in the due manner according to the law of Holy Church as is done in the case of bastardy.' In

<sup>1</sup> See also the case against the bishop of Worcester, Y. B. 24 Edw. III. f. 29 (Trin. pl. 21).

<sup>2</sup> Rolls of Parliament, ii. 245.

answer to this prayer the king willed that if title by avoidance came in plea before his justices, whereof the cognizance appertained to Court Christian, the party<sup>1</sup> should have his challenge, and the justices should do right. This somewhat enigmatical response was converted into a statute<sup>2</sup>. 'Whereas the said prelates have prayed remedy because the secular justices accroach to themselves cognizance of the vacation of benefices, whereof the cognizance and discussion belongs to the judge of Holy Church and not to the lay judge, the king wills that the justices shall henceforth receive the challenges made or to be made by any prelates of Holy Church in this behalf, and shall do right and reason in respect of the same.' This statute, like many others which touch the relation of the temporal to the spiritual tribunals, looks very much like an 'As you were.' Bishops and justices must fight the matter out: both parties should be reasonable; but the king does not like to decide their quarrels.

I believe that the justices held their ground. The traditional law of Coke's day was that 'by the constitution of the pope' if a clergyman accepts a second benefice 'the first is void *ipso iure* and the patron may present if he will,' although no sentence of deprivation has been passed<sup>3</sup>. In other words, the secular court would take direct notice of the ecclesiastical rule that avoids the one *beneficium curatum* when the other is accepted. Coke thought that the rule in question was the outcome of *De multa*, the canon of the Lateran Council of 1215. That canon would in fact have justified what was done by our Courts of common law, but when Coke proceeds to say that this is the constitution that is referred to in the cases of Edward III's day, he is mistaken. He had seen the Year Books, but did not know that the roll spoke expressly of Pope John and his *Execrabilis*.

Having mentioned John of Sandale and pluralism, it may be worth our while to observe that this distinguished clerk, while working his way upwards through the royal chancery towards the chancellorship of the realm and the bishopric of Winchester, had become a pluralist of the deepest dye. He, when yet a subdeacon, obtained the chancellorship of St. Patrick's at Dublin, the treasurer-ship of Lichfield, seven churches in seven dioceses, and three prebends at Wells, Howden and Beverley, and had leave from the pope to accept additional benefices to the value of £200<sup>4</sup>. The requisite dispensation he had obtained from Clement V at the instance of

<sup>1</sup> The statute suggests that the word should be *prelate* not *party*.

<sup>2</sup> 25 Edw. III. stat. 3, cap. 8.

<sup>3</sup> *Holland's case*, 4 Rep. 75 a; *Digby's case*, 4 Rep. 78 b.

<sup>4</sup> Register of Papal Letters, ii. 9, 27, 88, 119.

the king of England. This is a good illustration of that viciously circular process from which an escape was impossible until the pope's claims were utterly denied. The king's 'civil service' must be maintained, but, such is the nation's impatience of taxation, that it can only be maintained out of the revenues of the churches. The only method, however, by which these revenues can be secured for such an object consists in papal dispensations. Therefore the pope's power to dispense with the laws that he has ordained must be acknowledged. And then when the pope tries to make profit for himself out of the powers that we allow to him, we begin to complain and to pass statutes of 'provisors' that we dare not enforce, lest the king's 'civil service' should break down. We cannot get on with the pope, and yet we cannot do without him, for rightly or wrongly we believe that he can legislate for the church. It is an intricate and is not a pleasant tale; but it deserves telling, and yet will never be told in full until the Year Books have been properly edited.

F. W. MAITLAND.

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## REVIEWS AND NOTICES.

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[Short notices do not necessarily exclude fuller review hereafter.]

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*A Complete Manual of Canon Law.* By OSWALD J. REICHEL. Vol. I. The Sacraments. London: Hodges. 1896. 8vo. xv and 416 pp.

THIS, though a learned and an interesting, is also, at least for lawyers and students of history, a perplexing book. It is not a manual of English ecclesiastical law; it is not a rival for the familiar 'Phillimore,' of which we are now welcoming the second edition. It is not a history of the Canon law; and this we regret, for Mr. Reichel has shown both here and elsewhere that in many respects he is admirably qualified to write such a history and to give us something better than the very meagre and somewhat antiquated summaries which we find in our English books. Again, we have not here a statement of various systems of Canon law. There is no reason why the law of various churches, or (if the phrase be preferred) the law of various branches of the Church, should not be brought within two covers. We can well understand, for example, that Friedberg's *Lehrbuch des katholischen und evangelischen Kirchenrechts* is a very useful book, and deserves its fourth edition, though on one page we find what is distinctively *katholisch*, and on the next what is distinctively *evangelisch*. But so far as we can understand it, Mr. Reichel's Canon law is one and indivisible, or, in other words, it is a system which, taken as a whole, is not being enforced by any court. This bit of it may be enforced by a court at Rome, that bit of it by the courts of the Anglican Church; but the whole is not being enforced by the public authority of any Christian community. It seems to be some sort of canonical *ius gentium*, and to be conceived as the law which is (or ought to be) common to all such Christian communities as Mr. Reichel will allow us to regard as branches of a catholic church. Consequently it is often vague and indefinite law, for it is in truth a canonical *Naturrecht*.

There is no reason why a man should not endeavour to put English and American (temporal) law between two covers. But an attempt to state a system of law that is common to both countries would lead to an absurdly unsatisfactory result, especially in the constitutional sphere. We must make up our minds to talk either of Queen and Parliament, or of President and Congress; we cannot talk of both in the same breath; and a *tertium quid* which was neither House of Lords nor Senate, but the element common to the two, the abstract Second Chamber of the Pan-Anglo-American constitution, would be in truth a figment of our own brains. And if any of us are sighing for a Pan-Anglo-American 'reunion,' assuredly we shall not hasten its day by the postulation of a constitutional 'law' that is neither English nor American, but both. The fact of disunion should be faced, for, if it be not, our law will be the law of fairyland.

A review of the selection of rules which Mr. Reichel has made is a task beyond our powers, for we have no clear idea as to the measure of authority that he would attribute to the various voices that in time past have spoken

in the name of 'the Church' or of some section thereof. Let us take marriage, for example. Mr. Reichel has much to say about this matter that is of interest. Much of it is sound and accurate. Now it would be pleasant to quarrel with him about the *affinitas tertii generis*, of which (p. 361) he seems to give a wrong example when he speaks of two brothers marrying two sisters. It would be pleasant to take exception to the following footnote (p. 331): 'Gratian, Caus. XXVII, Qu. II, Init.: Viri mulierisque coniunctio individuum vitæ consuetudinem retinens, the latter words representing the Christian addition to a natural relation,' for Mr. Reichel is a Bachelor of the 'Civil' Law, and therefore knows that Gratian was borrowing from the Institutes, and should be careful to render to Caesar the words that be Caesar's. Really the Institutes Commissioners seem to have watered down the famous definition of Modestinus, because, with its talk about *ius divinum*, it looked a little too religious, and therefore too archaic; and was Modestinus a Christian? But this would be quarrelling about trifles and fiddling while Rome (or Canterbury) is burning. Such grave questions are open. To mention but one:—May a priest, can a priest, marry a wife? 'By the general law of the Church (to which the present English Statute Law is an exception), holy orders invalidate any after-contracted marriage' (p. 356). Are we to say then that according to the law of the English Church, the clergyman who, as he would say, marries a wife, does nothing of the kind, but commits fornication, for of course 'the present English Statute Law' does not proceed from 'the' or any Church? There is, however, some hope for our clergyman and his would-be wife. 'In this country not only is marriage allowed to all the clergy, collegiate as well as rural, by custom based upon secular legislation, but the custom has extended to bishops as well as to presbyters and deacons, and their marriage, and even their remarriage, is tolerated after as well as before ordination, for which there is no precedent elsewhere' (p. 275). This perhaps improves the good lady's position. She is not only an honest woman by 'the present English Statute Law,' but she is 'tolerated' 'by custom based upon secular legislation.' But what Church 'tolerates' her? Suppose that the 'presbyter' whom she married was one of those presbyters who are commonly called Roman Catholic priests: will his Church 'tolerate' her even 'in this country?' No, all this blurring and slurring is vain. Of two things one:—(1) 'The Church' has no law of marriage that is even moderately complete, or (2) 'The Church' has several antagonistic systems of matrimonial law.

Mr. Reichel's book has had the misfortune to fall into the hands of a reviewer who thinks that it is a castle (or a church) in the air, but who none the less sincerely admires the learning that has been spent upon its construction.

F. W. M.

*A Digest of Anglo-Muhammadan Law:* By Sir R. K. WILSON.  
London: Thacker & Co. 1895. 8vo. xxxii and 500 pp.

AMONGST the many curiosities of legal history in India, nothing is more curious than the contrast between the development of the Hindu and the Muhammadan law. Whole chapters of Hindu law have been manipulated, extended, cleared of difficulties and reduced to order under the joint influence of British and Hindu lawyers; a large portion of modern Hindu law is what might be called 'judge made,' and this body of law is accepted willingly by Hindus, who have never shown any reluctance to submit their legal differences to the arbitrament of the British courts.

With the Muhammadans it is far otherwise. They have never taken kindly to our courts. They do not like to bring their private affairs before them. Consequently we know far less about the Muhammadan law than we do about the Hindu law; the conflicting authorities have hardly at all been reconciled by the final decisions of the Privy Council.

This is evident at once on turning over the leaves of Sir R. Wilson's book. Comparatively few decisions of the British courts are referred to, and constant doubts are expressed as to what view these courts would take in a given case.

A treatise, therefore, on Muhammadan law by so accomplished and experienced a student of it as Sir R. Wilson is very welcome. And, as far as I am able to judge, the author has executed his task with the skill and care which we should expect from him. Evidently much thought has been bestowed upon the propositions of law which form the digest; the authorities for and against these propositions are stated with clearness and candour in the notes, and I do not think a lawyer wishing to ascertain the view taken in India of any special point of Muhammadan law could do better than begin by consulting Sir R. Wilson's book.

A conspicuous feature of this book is its very great fairness. The criticisms are courageous, but they are sound, sensible, and acute. This is very useful; for it is most desirable that English people should know what sort of system it is that we administer in India under the name of Muhammadan law. They ought to know its advantages and its defects. This information can nowhere be so well obtained as from Sir R. Wilson's book. And by a perusal of this book the unprejudiced reader would, I think, see that the Muhammadan law, though far from being altogether bad, has some very serious defects; and whilst it is not so pure a system as Mr. Justice Ameer Ali would wish us to believe, it is not such a tissue of puerilities and obscenities as might be inferred from the last published volume of the Tagore Lectures, the author of which, strange to say, is himself a Muhammadan.

It is, I think, to be regretted that Sir R. Wilson, instead of adopting the usual form of a treatise, should have chosen the repulsive and inconvenient form of a digest. His choice was particularly unhappy in the present case, because we entirely lose by it the interest which attaches to the Muhammadan law from its history and from its frequent analogies with other systems of law. The comparison of its principles with the Roman law (by which it may have been directly influenced), the large importation into it of Arabian customs, the similarity of those customs to those prevailing in India and in Europe,—all this is scarcely alluded to.

I am aware that Sir R. Wilson adopted the form of a digest advisedly, and that he defends his choice in the Preface. He seems to have been influenced by the example of Sir James Stephen, whose object was to put the law in a form ready for codification. But the Muhammadan law as administered in India is not ready to be operated upon in this way. It cannot be made to fall into a series of abstract propositions the substance of which may be considered as finally settled. This is a condition of things which can only be arrived at after a large amount of discussion and a free interchange of views, such as is not likely to take place for a long time to come. But this is a minor point. The book is a very useful one notwithstanding.

W. M.

[The 'puerilities and obscenities' alluded to by the learned reviewer are inevitable in a system which endeavours to formulate rules of legal obligation

applicable to the most intimate relations of life. In Europe the canon law (not to speak of purely theological casuistry) did not wholly escape this danger.—ED.]

*Company Precedents. Part II. Winding-up Forms and Practice.* By F. B. PALMER, assisted by F. EVANS. London: Stevens & Sons, Lim. 1896. La. 8vo. lxxi and 790 pp. (30s.)

Nor the least of Mr. Palmer's many merits is that he is eminently practical and to the point. In his *Company Precedents*, Part I, his aim is to see how what the commercial world wants can be done, to put it into legal shape and render it impregnable against the insidious attacks of the Court. He pauses now and again to discuss the correctness of judicial decisions, but as a draftsman he is concerned not so much with resolving knotty points of law as in pointing out the business bearing of cases and applying them. This excellent characteristic of practicality is as much in evidence in the present edition of the *Winding-up Forms* as in the *Company Precedents*. No one is better aware than Mr. Palmer that, in that prosaic proceeding known as winding up, what the ordinary person wants is not to assist in deciding nice points of law, not to have the honour of becoming a 'case,' but to get paid his debt, or to realize his security, or have his name struck off the list of contributories, or a misfeasance claim against him met successfully. These are matters which, in Lord Bacon's phrase, 'come home to men's business and bosoms,' and in these and such as these the practitioner is personally conducted along the rough and tortuous track by a guide of wide and varied experience. If it is a winding-up petition the practitioner is presenting, the numberless little points of form and practice are here collected for him. If he would prove his debt, the different kinds of debt are conveniently classified. If he would know whether he is a contributory or not, the cases pro and con are here in parallel columns, and, with these, inexhaustible store of forms. Lord Stowell used to say that dining lubricates business. It is certain that nothing lubricates legal business better than well-considered forms like Mr. Palmer's. A Bethell with the assurance of the newly-fledged barrister may draw a bill of exceptions by the light of nature, but, as a rule, forms drawn by the light of nature are anathema. They give infinite trouble to judges, to registrars, to chief clerks, to everybody concerned. It is a striking testimony to the value as well as variety of the forms in this volume that when the first edition appeared, about twenty years ago, it contained fifty forms only; to-day it contains considerably over eight hundred. The sapling has grown into a vigorous tree.

A considerable amount of space is given to voluntary winding up, and for a very good reason, that ninety per cent. of the companies that go into liquidation are wound up voluntarily, not a few, of course, for purposes of reconstruction. This topic again, reconstruction—and particularly that form of reconstruction represented by schemes of arrangement under the Joint Stock Companies Act, 1870—is fully dealt with, and as it is one on which the light of nature is dim and uncertain in the extreme, the advice given is especially welcome. Few, indeed, in these days can escape being drawn, in one capacity or another, as contributories or creditors or auditors or directors or debenture-holders, into the swirl of some sinking company, and all these will find Mr. Palmer's latest work invaluable as a 'tabula in naufragio.'

*A Treatise on International Law.* By WILLIAM EDWARD HALL. Fourth Edition. Oxford: Clarendon Press. London: Henry Frowde and Stevens & Sons, Lim. 1895: 8vo. xxvii and 791 pp.

It is unnecessary at this time of day to enlarge on the merits of the standard English treatise on international law. The present edition 'was throughout prepared for the press by the late Mr. Hall,' and its publication has been very carefully conducted by Mr. Beresford Atlay, Professor Holland prefixing a short preface. The qualities which gave the book its reputation, especially the practical sagacity of the author's views and the care with which he watched every event bearing on his subject and every tendency to the modification of opinion at home or abroad, mark this equally with the previous editions. The suddenness of the regretted author's death allowed him to devote, to the last, his usual attention to his favourite study. And thus, although the book is just one of those which judicious editing may keep in use and up to the mark for a long period, the present edition will always have an especial value as embodying the last thoughts of a man who combined in a remarkable degree the character of a scholar with that of a man of the world.

J. W.

*The Ecclesiastical Law of the Church of England.* By the late Sir ROBERT PHILLIMORE, Bart., D.C.L. Second Edition by his son, Sir WALTER GEORGE FRANK PHILLIMORE, Bart., D.C.L., assisted by CHARLES FUHE JEMMETT. London: Sweet & Maxwell, Lim. and Stevens & Sons, Lim. 1895. 2 vols. 8vo, paged continuously. lxxxvi, viii and 1883 pp. (£3 3s.)

PHILLIMORE'S *Ecclesiastical Law* is a book so well known that when we say that the new edition preserves, with improvements, the form and characteristics of the former edition, no further description is required. We need hardly remind our readers that it is a work of a rather discursive character, and is by no means limited to the purposes of a practising lawyer's manual; and this character, while it greatly adds to the interest of the book, must be our excuse for dealing in this notice with a few points, the importance of which may be thought by superficial observers to be more speculative than practical. On p. 96 we find: 'Holy orders being indelible, the Church is careful not to allow idle persons or those wholly unprovided with the means of supporting themselves to be ordained. She requires what is technically called a title.'

The doctrine of the indelibility of holy orders belongs to a class of ecclesiastical doctrines, comprising also that of apostolical succession, the colour of the devil, the infallibility of the pope, and the indissolubility of marriage, which, however indisputably true in themselves, rest more upon effective assertion than on historical investigation. Indeed, historical investigation shows that few doctrines of this class have at all times been held as indisputable truths. The indelibility of holy orders is an instance in point.

The passage we have cited is found also in the first edition of Phillimore's *Ecclesiastical Law*, and (with the exception of the opening words, 'Holy orders being indelible') is in effect found in Burn's *Ecclesiastical Law*, and in Gibson. By adding these words Phillimore surely implies that the indelibility of holy orders is the reason why the Church of England requires



a title for ordination. This is more than Burn and Gibson knew, and if the statement is based on some authority of intermediate date, we are not told where to find it. Of the authorities to which we are in fact referred, one indeed seems decidedly opposed to the theory of indelibility, and is almost recognized by Gibson (i. 141) as being against it. When the indelibility of orders became a truth to be maintained, the commentator-canonists had to explain away inconvenient texts; and the method they adopted was to suggest that '*ordinatio irrita habeatur*,' and phrases of that kind, meant nothing more than that the party was suspended from the exercise of his powers, but not deprived of them. Under these circumstances we may be justified in hoping that the next edition of Phillimore will give us the authority for holding that the indelibility of holy orders is the basis of the necessity for a title.

Our author commits himself to the statement that the rite of Confirmation is founded on the apostolical practice and precedent recorded in the Acts of the Apostles, viii. 14-17. Without presuming to offer any opinion on the truth of this statement, we feel that it is hardly the office of a law-book to be so dogmatic, and that it would have been better to follow the example of Benedict XIV, Instit. Ecc. vi. 5, '*Eam disputationem Theologis relinquimus, utrum id Sacramentum tunc primum [Salvator] induxerit, cum sanctissimas manus super puerorum capita imposuit; utrum etiam illud constituerit non quidem administrando, sed facta solum Apostolis promissione, ut ex S. Ioanne deprehenditur "Si non abiero, Paracletus non veniet ad vos; si autem abiero, mittam eum ad vos." Denique utrum in ultima coena id everserit; vel cum Apostolis inquit "Accipite Spiritum Sanctum"; an vero die Pentecostes, cum Spiritu Sancto caelitus demisso confirmati fuerunt: an postquam a mortuis excitatus, quadraginta dierum spatio cum ipsis versatus fuit.*'

Our author therefore here throws over the Roman Canon Law altogether; and he is in a position to do so, because the Roman Catholics hold Confirmation to be a sacrament, and are consequently under the obligation of discovering that it was ordained by the Founder himself; whereas Anglicans, who do not consider it to be a sacrament, have a freer hand. But from the fact that our author introduces his statement without any qualification, one might conclude that no other explanation of the origin of this rite was admissible in the Church of England. This we apprehend would be an error, and possibly a heresy.

We still find (p. 922) the Court of Audience mentioned as a distinct court in which the primates once exercised a considerable part of their jurisdiction, though now fallen into desuetude. It is a very mysterious court, whose existence is more a matter of faith than of history. The only really satisfactory authority on the subject seems to be the late case of the Bishop of Lincoln, in which it appears to have been decided that the court then sitting was *not* the Court of Audience. The curious thing is that Lindwood himself seems to have tried to lay the same spectre, for he writes (Lindw. 278) '*Nec reperies in toto corpore iuris canonici in aliquo textu mentionem factam de Auditore causarum curiae alicuius archiepiscopi, sed quod post ipsum Archiepiscopum quarumcunque causarum in foro suo iudiciali cognitio, examinatio, et terminatio pertinere debent ad eius officialem generalem.*'

We have no doubt that the present edition will enjoy a popularity as great as that of its predecessor, and as well deserved.

*Negligence in Law.* By THOMAS BEVEN. Second Edition. Two Volumes. London: Stevens & Haynes. 1895. La. 8vo. cxc1, 1779, 1970 pp. (£3 10s.)

ALTHOUGH these volumes are nominally a second edition of the author's *Principles of the Law of Negligence*, they form substantially almost a new work, since the arrangement is altogether different from that previously adopted, and nearly half the contents are new, while much of the remainder has been considerably modified.

The work is divided into seven books, the arrangement of which flows directly from the author's statement of the characteristics of negligence in law. After an instructive criticism of numerous definitions of the term which have been attempted, he concludes that it is a hard matter to define, and contents himself with a statement of its 'ingredients,' namely, 'There must be (1) a legal duty to exercise control, and (2) a failure in the exercise of the control necessary in the circumstances of any particular case. Where these two elements are found, a case of negligence in law exists.' The term control is used here in a very wide sense, since it includes not only control over property, but also control over oneself. And hence the following division of the subject-matter, based on a classification of the matters over which control must be exercised:

I. A general duty directly arising out of the constitution of society (Book II, Authorities specially constituted for exercising Control).

II. A special duty arising from the free will, or from the exigencies of particular men or particular classes; which head of special duty is again divided into—

(i) The most general relations in which a man is called on to exercise control, namely,

(a) Where he has the control of property (Book III, Duty to exercise Control over Property);

(b) Where he personally comes into contact with others, and that either directly or through the intervention of others (Book IV, Duty to answer for One's Own and Others' Acts).

(ii) The special control which a man has to exercise is referable to the terms of the various species of contracts into which the circumstances of his life are the occasion of his entering (Book V, Bailments; Book VI, Skilled Labour; and Book VII, Unclassified Relations, as Partnership, Trusteeship, Banking, and Estoppel).

Notwithstanding the author's misgivings, it appears to us that it is possible to frame a definition of negligence in fairly comprehensive terms which will express with tolerable precision the character and scope of this head of obligation; as, for instance, 'Actionable negligence is the unintentional breach of a duty to take care in the exercise of one's rights and duties, proximately producing damage to a person entitled to claim the observance of that duty.'

The arrangement of the various classes of cases which illustrate and enforce the general doctrine is a matter of subordinate importance, and if the classification adopted by the author wears a somewhat philosophic air, at any rate it enables us perhaps as well as any other to find our way through the masses of cases.

The author's treatment of the difficult subject of contributory negligence is excellent. Where the circumstances out of which the injury ultimately arises form a series of acts or events, the rule is that the party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence

of his opponent, is considered solely responsible for it, no matter how long the series. Where the circumstances are practically concurrent, the question is, whether, as between the two parties, the injury was due solely to the defendant's negligence. These points are well brought out, and illustrated by a full discussion of all the principal cases. The same chapter contains an able and instructive criticism of those cases where a person is held not responsible for an act done under sudden impulse, and hence not disentitled to recover, notwithstanding that his physical act has contributed to his injury. Where the impulse arises from terror produced by the negligent act of the defendant, it may fairly be said that the latter is alone responsible for the incapacity to judge calmly which leads to the plaintiff's improvident act. The cases where the injury is incurred in an effort to preserve human life are far more difficult to bring within any principle. The author states the problem very clearly: 'The justification of the act is that the negligence of the railway company, working through feelings akin to those which prompted the rash leap in *Jones v. Boyce*, has caused an act that is either instinctive or obligatory. . . . If the act of the deceased were instinctive, it comes under the class of cases to which we have already alluded; if it were deliberate, its justification must be sought on some such ground as the existence of a duty cast on the deceased by reason of the default of the defendants.'

It is almost impossible in the short space of a review to do justice to such a work as this. It is, in fact, a cyclopaedia of the law connected with negligence. The industry of the author has been truly extraordinary; and it is not too much to say that he has overlooked no point of importance connected with his subject. If his style is somewhat diffuse, it is probable that the practitioner, who generally consults such a work for the purpose of exploring some small corner of the law, will readily forgive this in consideration for the completeness, the accuracy, and the soundness of judgment which characterize the work as a whole.

One feature of the work is especially remarkable, namely, the very extensive use that has been made of authorities outside the English law, especially Scottish and American cases, and the *Corpus Juris Civilis*. Indeed, from this point of view the book may well claim to rank as a valuable work of comparative jurisprudence without forfeiting its claim to utility as a practical text-book.

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*A Treatise on the Law of Evidence as administered in England and Ireland; with Illustrations from Scotch, Indian, American and other Legal Systems.* By His Honour the late Judge PITT-TAYLOR. Ninth Edition. (*In part re-written.*) By G. PITT-LEWIS, Q.C. Two volumes. London: Sweet & Maxwell, Lim. 1895. La. 8vo. cccxlii, cciv, and 1234 pp. (£3 3s.)

MR. PITT-LEWIS is of opinion that an editor of such a book as 'Taylor on Evidence' 'must be bold,' and he has therefore materially shortened his text. He makes up for it in the index and tables, however, for the ninth edition contains altogether only twenty-four pages less than the eighth. The reduction, which he asserts to be of about one-fourth in bulk (of the text), has been effected by omitting obsolete or immaterial statements, and pruning—apparently with some severity—Mr. Pitt-Taylor's 'rhetoric.' Beyond the ordinary labours of bringing a standard work into accordance with recent decisions, the most important alteration introduced by Mr. Pitt-Lewis is, we think, his omission of any names of reports in citations of cases in foot-

notes. The name of every case has, as it ought to have, the date of its decision appended, and sometimes the name of the judge, but for the references it is necessary to consult the table of cases. The motive of this departure from ordinary practice is to save the repeated printing of long strings of references, constantly half a dozen or so in number. In our judgment this solution of the difficulty is not quite satisfactory. The reference is an essential part of the authority relied upon, and at least one reference ought, in our opinion, to accompany every mention of a case. The additional labour for the reader of being separately referred for every case to the table of cases is considerable, and seems to us to outweigh the advantage gained by economy of printing. Probably the best compromise of the difficulty is to give one reference in the text or foot-note, and that to the most authoritative report—in all modern cases to the Law Reports—and to give all other references in the table.

Mr. Pitt-Lewis refers in his Preface to the 'necessity for the amendment of the Law of Evidence in Criminal Cases, by permitting accused persons and their wives and husbands to give evidence,' as being a matter upon which 'the great body of English lawyers' are decidedly 'agreed.' He would have done well to add that this agreement is especially conspicuous among those lawyers who have not, during the last eleven years, been constantly engaged in trials of persons of whom about twenty per cent. are competent witnesses and the others are not. Among lawyers who have been so engaged, who alone can judge by experience of the 'necessity' of altering the general rule on the subject, there is no considerable preponderance of opinion in favour of the alteration—if indeed the preponderance is not the other way. It is to be hoped that before the change is resolved upon, some opportunity will be taken of ascertaining the opinions of this comparatively small body of men. No doubt the opinions of Chancellors, Chief Justices, and so forth are worth more, *ceteris paribus*, than those of puisne judges and stuff-gownsmen; but when the views of the latter are founded upon an actual experience now of some duration, and those of the former upon more or less remote analogies, it seems a pity to neglect this source of information as to what are the practical consequences of making prisoners witnesses.

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*The Law of Copyright.* By THOMAS EDWARD SCRUTTON. Third Edition. London: W. Clowes & Sons, Lim. 1896. 8vo. xxiv and 313 pp. (15s.)

MR. SCRUTTON'S excellent book holds its own in a third edition as being the most concise, complete, and accurate treatise on a subject full of difficulties. The following observations in the Preface deserve the greatest publicity, and ought to be considered by our heads of departments:—'But hardly a copyright case comes into Court, hardly a copyright question comes before counsel for opinion, which does not emphasize the necessity for a thorough revision and codification of the numerous and ill-drafted Acts which constitute the Copyright Law of England. The Copyright Commission urgently recommended this in 1878, but we seem after eighteen years no nearer the desired haven. Is it too much to hope that a strong Government, with time to spare for unambitious but useful legislative reforms, may do something practical to assist the literary workers of the empire?'

A clear account will be found in this edition of the rather confusing series of 'Living Pictures' cases, and the Canadian copyright question (soon, we hope, to be settled) is touched on in a note, with a reference to the latest parliamentary papers on the subject.

*The Law relating to Literary Copyright and the Authorship and Publication of Books.* By DANIEL CHAMIER. London: Effingham Wilson. 1895. 8vo. xvi and 159 pp.

THIS is upon the whole a useful and a serviceable book, strictly limited, as its title shows, to literary copyright. The arrangement is not very good, but the index is comprehensive, and enables one to turn readily to any point which is needed. The decisions cited are well 'up to date,' but there is too great a tendency to cite Scottish and American cases as if they were of binding authority. It is not correct to lay down broadly, as Mr. Chamier does, that for a literary work to be entitled to the enjoyment of copyright it must be 'of value as literature.' How many books are there published every week which fail to meet this requirement? Mr. Chamier's chapter on agreements and transactions relating to literary works will be useful alike to lawyer and to layman, and he deals with the relations of parties arising out of the publication of books in a way which should be found valuable. But his chapter on International Copyright is not so satisfactory. It is a mistake to say that Austria has accepted the Berne Convention: the reference given is to a copyright convention between Austria and Great Britain only. Nor is it correct to say that prior publication in countries to which the Berne Convention does not apply precludes copyright in this country, as this is in many cases secured to countries outside the Union by separate conventions. Mr. Chamier may be trusted, but not trusted implicitly, or with blind faith.

*Die Geschichte des Urheberrechts in England mit einer Darstellung des geltenden Englischen Urheberrechts.* Von ALBERT OSTERRIETH, Secretär der Association littéraire et artistique internationale. Leipzig: C. L. Hirschfeld. 1895. 8vo. xiv and 221 pp. (6 marks.)

THIS is the best history of the English law of Copyright which has yet appeared. The English writers who have dealt with the subject have in the main been content with what is to be found in the judgment of Willes J. in *Millar v. Taylor*, 4 Burr. 2303; the present author, not satisfied with this, has gone to the original sources of information, of which he gives a list. His examination of these leads him to conclude that the practice of the Stationers' Company and the various Star Chamber measures for the regulation of the press (of which a very full account is given) led naturally to the acceptance by the Courts of the theory that an author has a right at common law to the products of his own labour. This was the substance of the judgment in *Millar v. Taylor*, and it is undoubted law as regards unpublished manuscripts, though not put on quite so broad a ground. But the doctrine has never been accepted by either branch of the Legislature, as appears from the judgments in *Donaldson v. Becket* (2 Bro. P. C. 129) and *Jefferies v. Boosey* (4 H. L. C. 815), and from the various Copyright Acts which seem to regard copyright as a special statutory power given to an author to interfere with the rights of others to reproduce this work. In the want of recognition of this principle Herr Osterrieth finds the principal cause of the imperfections which have made our copyright law the scorn of every one (whether Englishman or foreigner) who has ever studied it. We should be more disposed to find it in ignorance of the actual conditions of literary and artistic production combined with bad draftsmanship. It is much to be regretted that the author's ignorance of English matters outside his particular subject has led him to present us with such monstrosities as

the 'Court of Lords' or the theory that the Berne Convention is part of the English law by itself, and not only as forming part of an Order in Council, which is itself limited by the Act of Parliament under which it is issued. But this last is a common error of foreign writers. The book must be used with caution, on account of the numerous typographical errors to which allusion is made in the preface.

*Registration of Land or Registration of Title. A paper addressed to the Right Hon. the Lord Chancellor.* By JAMES EASTWICK, of Lincoln's Inn. London: Stevens & Sons, Lim. 1896. 8vo. 59 pp.

THIS pamphlet contains much matter worthy to be considered by those who wish to reform the law relating to the transfer of land. The author points out very clearly some of the defects in the present system of registration under the Act of 1875; he shows how readily that system lends itself to forgery, and the difficulty it gives rise to respecting boundaries. He points out the salient error in the bill promoted by the Incorporated Law Society, viz. that a purchaser who takes by a conveyance from an estate owner is to take free from all equities, whether he has notice of them or not.

The author considers that 'the idea that title means a right against all the world' is the root of all the difficulties and defects that he points out in the present system of registration. 'Title in the sense in which the word is used in the law of vendor and purchaser is not a right, still less a right against all the world; it is a means of proving a right. To give it any wider meaning than this is to confuse the evidence with the judgment; to make it mean a right against all the world is not only to confuse the evidence with the judgment, but further to give a judgment, which ordinarily is and can only be a judgment *in personam*, the effect of a judgment *in rem*.'

The author's own scheme is to enable existing deeds to be registered; to cause all new documents relating to land to be inoperative till registered, to be void unless registered within a prescribed period, and to take priority according to date of registration. Registration to be notice to all the world; no person to be affected by notice of any deed, &c., or lien, &c., executed or arising after the new scheme comes into operation, and not appearing on the register. Registration is to be effected as follows: (1) Instruments may be prepared in any form and engrossed or printed in any shape, but two copies at least of any instrument to be registered are to be prepared in proper form; (2) The person leaving the deed for registration is to pay all duties and fees and to enter the particulars of the deed in the proper form in a book kept at the office. The Registrar is to examine the copies with the deed, to mark the deed and copies with the number of the entry, to mark every parcel in his map and enter the names of the parties in an alphabetical list, to remit the deed to a central office for filing, to retain one copy for reference in his own office, and to deliver out the other for use. We do not think it necessary to give further details of the author's system of registration. Without discussing the merits of registration of deeds, we may point out that the system suggested by the author will be very expensive. Making copies, examining copies with an original, cost money; we cannot help thinking that, unless the costs of registration are to be borne by the public, all persons who deal with land will have, if Mr. Eastwick's system comes into operation, a very unpleasant addition to their solicitors' bills.

The author makes a suggestion which requires careful consideration, as it appears to have in it the germ of a system which might with advantage be applied to any amended system of registration of title. He proposes that a person claiming under a registered document should be capable of having his title certified after official examination, and that every certified title is to be accepted on a subsequent sale as good in the absence of evidence to the contrary.

The author points out that the difference between a certificate of title under his scheme and a registration with absolute title is that the former, being founded on documents taking effect solely *ex parte*, does not, in the event of fraud or error, prejudice third parties, while the latter does.

The author also proposes that private offices, as opposed to the State, should undertake to insure certified titles. Lastly, he proposes that boundaries should in certain cases be marked out by boundary stones. There may be some few cases where this would be convenient, but in the country, where boundaries are constantly, though very slowly changing, the compulsory use of boundary stones would, we think, be inexpedient.

It has been impossible within the necessary limits of space to do justice to Mr. Eastwick's pamphlet. We can only repeat that all who take interest in the reform of the law of Land Transfer ought to study it with attention. Even those who do not agree with his views will find that the mere fact of trying to refute them will tend towards rendering their own views more clear.

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*Recueil des Traités et Conventions conclus par la Russie avec les Puissances Étrangères, publié d'ordre du Ministère des Affaires Étrangères.*

Par F. DE MARTENS. Tome XI. *Traités avec l'Angleterre 1801-1831.* St. Pétersbourg. 1895. x and 492 pp.

THIS volume of the Russian official collection of Treaties, in course of publication under the editorship of Professor de Martens, of the University of St. Petersburg, is devoted to the period of Anglo-Russian relations which extends from the conclusion of the Navigation Treaty of 1801 to the international conventions for the Independence of Belgium in 1831. The agreements to which, during the interval, the Powers in question were parties, reach the respectable number of thirty-four. Professor de Martens' *modus operandi* is to introduce each document or group of documents by a detailed note embracing the diplomatic correspondence and negotiations which led to the agreement. Thus these notes form a sort of history from the Russian point of view of the diplomacy of the thirty years they deal with.

The armed neutrality was the first breach in a long traditional amity between the two states, and according to Count Worontzow, who stayed for twenty years in England and became *un véritable anglais*, the famous Empress had no idea that it was hostile to England. Whether the Count therein was right or wrong, he was the means of converting Alexander I to a sense of the desirability of a settlement with Great Britain, which would put the vexed question of contraband on a satisfactory footing.

The above-mentioned maritime convention resulted, and was the starting-point of a new lease of friendship till 1807. After the destruction of the Danish fleet, the consequent rupture with Russia and the reproclamation of the armed neutrality, it was only in 1812 that Great Britain and Russia were again joined in a common diplomatic act. At the Congress of Vienna no questions of maritime law were discussed, England having refused to submit such matters to a congress.

Except this subject of the rights of neutrals in time of war, the interval from 1807 to 1812 and a slight difference as to British intervention in Persia, the thirty years described are characterized by harmony of views between the two States on nearly all questions.

There is much original matter in the notes, which like the documents are printed in French as well as in Russian, the two texts being set out in parallel columns.

Among the many quotations the following passage from a despatch of Worontzow, describing Pitt, though scarcely within the scope of this Review, will be read with interest:—

‘Cet homme joignait aux talents les plus extraordinaires la vertu la plus sublime, aux mœurs les plus pures le caractère le plus doux et le plus humain; pas la moindre teinte d’ambition, d’orgueil ou de vanité n’est jamais entrée dans sa belle âme; modeste, naïf, il paraissait être le seul qui ignorait tout ce qu’il y avait de grand dans son caractère. Jamais il n’a été homme de parti, mais toute sa vie était consacrée à sa patrie qu’il adorait. . . . Il a sauvé ce pays d’une banqueroute inévitable, il l’a sauvé d’une révolution, qui aurait été immanquable en 1792 et 1793, s’il n’avait employé toutes les ressources et la fermeté de son grand caractère pour s’y opposer. Il n’y avait qu’un Ministre aussi pur que lui et jouissant comme lui de la confiance nationale qui eût osé prendre les mesures de vigueur qu’il a développées. En un mot, comme homme d’Etat il n’a eu et n’aura jamais d’égal, et comme homme privé il honorait et embellissait la nature humaine.’

*The King's Peace, a Historical Sketch of the English Law Courts.* By F. A. Inderwick, Q.C. (Social England Series). London: Swan Sonnenschein. 1895. 8vo. xxiv and 215 pp.

MR. Inderwick has drawn a bright little sketch of the history of the English Courts. If he has not in this book added much to the sum of human knowledge, that was not his intention. He has told his story pleasantly, and when it comes down to modern times he has told it accurately. We can hardly say so much of what he has written about the earlier middle ages, though even here when he errs he is usually in good company or what was once accounted such. The most curious slip that we have noticed in his work occurs when he is speaking of the would-be foundation charter of Westminster Abbey. ‘The signatures,’ he says (p. 32), ‘are as follows: First the king signs EADPARD in a school-boy’s hand and makes his cross.’ Well, perhaps the forger of that charter was rather rash when he turned on his very best Anglo-Saxon majuscule to glorify the king’s name; still he knew how to make a respectable w of the Old English kind, and never meant us to believe that a king had written his own name. We are not of those who invent apologies for monastic forgers; still we feel that ‘school-boy’s hand’ is too severe. However, Mr. Inderwick’s book is pleasant, and the pictures in it, though they come for the more part from well-known sources, increase its value.

*The Law of Bills of Sale.* By JAMES WEIR. London: Jordan & Sons, Lim. 1896. 8vo. xlviii and 386 pp. (2cs.)

THIS is a useful book on a most difficult subject. Bills of Sale are principally regulated by the Acts of 1878 and 1882, and these Acts are directed to be read together; but the objects of the two Acts are quite different, and hence probably comes the existing confusion which puzzles



the public and embarrasses the Courts. The aim of the Act of 1878 is to protect traders from customers who may obtain credit by remaining in the apparent possession of property which they have really sold or mortgaged; while the object of the later Act is to protect small borrowers from their natural enemy, the money-lender. This distinction, which is of great importance in any attempt to interpret the Acts, is well pointed out by Mr. Weir in his introductory chapters. The book is clearly written, but a dive into its pages will convince the reader (if he requires conviction) that the law on the subject is in a state of confusion and perplexity which urgently calls for amendment. As it now stands, bona fide business transactions are often liable to be impeached, while most oppressive dealings are rarely checked by any provision, except perhaps by accident. We notice that *Peace v. Brookes*, reported in October last, is not only cited but fully stated (op. cit. p. 275), and in this respect as in others Mr. Weir's book seems quite up to date.

*Medical Partnerships, Transfers, and Assistantships.* By W. BARNARD and G. BERTRAM STOCKER. London: Stevens & Sons, Lim. 1895. 8vo. xi and 249 pp. (10s. 6d.)

THIS book will prove useful to medical men and solicitors in the country, where the subject with which it deals is of special importance. In one part of the book the law as to medical partnerships is treated by Mr. Barnard clearly and accurately; in the other, for which Mr. Stocker is responsible, convenient forms are given.

We have also received:—

*A Selection of Leading Cases on Various Branches of the Law.* With Notes. By JOHN WILLIAM SMITH. Tenth Edition. By THOMAS WILLES CHITTY, JOHN HERBERT WILLIAMS, and HERBERT CHITTY. Two vols. London: Sweet & Maxwell, Lim. 1896. La. 8vo. Vol. I, 830 pp; Vol. II, 840 pp. (preliminary matter and indexes not paged). (£3 10s.)—The new editors have effected some cautious and useful reforms in the arrangement of this edition; they have added *Fletcher v. Rylands* to the principal cases, and have laid the ghost of *Waugh v. Carver*; and the notes are well posted up. We have observed only one approach to a mistake; at p. 97 of vol. ii. *Alton v. Midland Ry. Co.* is still cited as if it were an unshaken authority. *Taylor v. M. S. & L. R. Co.* is however duly cited at p. 202 of vol. i., though, in our opinion, hardly with adequate appreciation of its importance. In the next edition we should be glad to see references to some of the leading American decisions.

*Ruling Cases.* Edited by ROBERT CAMPBELL. With American Notes by IRVING BROWNE. Vol. VI. Contract. London: Stevens & Sons, Lim. Boston, Mass.: The Boston Book Co. 1895. La. 8vo. xxxiv and 912 pp. (25s.)—This volume deals with a subject complete in itself, that of Contract, and will be found a good collection of leading cases, though not so full as Mr. Langdell's or Mr. Finch's. We are still of opinion that the total omission of American cases from the text is a serious drawback, but this is a settled part of the scheme. The notes are good so far as they go; we should have liked them better if they had been more critical and less of a mere digest of results; but here again economy of space may have been thought the first thing needful.

*Recollections of Lord Coleridge.* By W. P. FISHBACK. Indianapolis and Kansas City: Bowen-Merrill Co. 1895. 8vo. 134 pp. (\$1. 25).—This is

a prettily got up and pleasantly written little book, and may be commended to American readers. English lawyers would naturally find little new matter in it, and certainly they will not be surprised by the discreet statement that in the course of one case tried by Lord Coleridge in the author's presence 'his lordship nodded as if he were asleep.' The author certifies that on this occasion his lordship's summing up proved him to have been awake. Mr. Fishback is an admirer of Lord Coleridge to the point of reproducing almost too faithfully some of his prejudices against the British landed aristocracy, which were really, we conceive, survivals from the old-fashioned Liberalism of the Reform Bill period.

*Every Man's Own Lawyer.* By a Barrister. Thirty-third Edition. London: Crosby, Lockwood & Son. 1896. 8vo. xvi and 736 pp. (6s. 8d.).—In a notice of the last edition of this book (L. Q. R. xi. 204) several mistakes, some of them serious, were pointed out. Not one of them has been corrected. The editor, however, is satisfied that the glossary of legal terms containing these mistakes 'has proved a useful and acceptable addition.' It is not for the profession, at all events, to complain.

*Comyns' Exercises on Abstracts of Title, arranged for the Use of Law Students and Articled Clerks.* Fifth Edition. With an Introductory Essay on Assurances. By H. W. CHALLIS. London: Reeves & Turner. 1895. viii and 315 pp.—The appearance of a fifth edition leaves no doubt of the value of this little book to those law students and articled clerks to whose use it is devoted. But we must draw the particular attention of all law students, whether or not *eiusdem generis* with articled clerks, to the introductory essay. It contains a particularly lucid account of the history and operation of Fines and Recoveries in their character of assurances.

*The Law relating to Particulars and Conditions of Sale.* Second Edition. By W. F. WEBSTER. London: Stevens & Sons, Lim. 1896. La. 8vo. xliii and 531 pp. (25s.).—This book has entered on the course of growth in bulk which marks the career of useful text-books on practical subjects. Without very careful editing they break down under it sooner or later: but this book can well afford to grow yet awhile.

*The Law of Husband and Wife.* By MONTAGUE LUSH. Second Edition. By MONTAGUE LUSH and WALTER HUSSEY GRIFFITH. London: Stevens & Sons, Lim. 1896. 8vo. lxxix and 626 pp. (25s.).—The first edition of this book was fully and favourably noticed in L. Q. R. i. 129. In the Preface to this edition the editors state that they have corrected a certain number of errors that had crept into the first edition, and have endeavoured generally to bring the work up to date. The chapters on Separate Property, Restraint on Anticipation, and Contracts have been practically re-written.

*A Selection of Leading Cases in the Common Law.* With Notes. By WALTER SHIRLEY SHIRLEY. Fifth Edition. By RICHARD WATSON. London: Stevens & Sons, Lim. 1896. 8vo. lxiv and 619 pp. (16s.).—The editor of this (the fifth) edition of Shirley's Leading Cases 'has endeavoured to increase its utility as a book of reference for practitioners without rendering it less acceptable to the law student.' There is an increase of some sixty pages in the present edition, but no corresponding increase in the price.

*Synopsis of Contemporary Reports, 1832-1895.* London: Stevens & Sons, Lim. 1896. 4to. (5s.).—This Synopsis, issued in connexion with the Law Journal Reports, consists of three charts, one each of the equity and common law reports published between 1832 and 1895; and a third containing all the series of 'mixed' reports from 1866 to 1895. The charts

are strengthened with linen backs. A new feature is the use of red ink to show the continuation or discontinuance of a series.

*The Students' Legal History.* By R. STORRY DEANS. London: Reeves & Turner. 1896. Sm. 8vo. vii and 263 pp. (6s.)—The author begins by quoting the 'Mirror of Justices' (not 'of Justice' as he calls it) as an authority for Anglo-Saxon law and misdating it about a century and three-quarters. We have not had time to read any more before going to press.

*Traité des Obligations à Primes et à Lots.* Par HENRI LÉVY-ULLMANN. Paris: L. Larose. 1895. 525 pp.—This subject has not the same interest for Englishmen as for continental readers. Those, however, who do happen to be interested in it, will find the matter ably and fully discussed, and the laws on the subject of the chief States of Europe carefully contrasted.

*Précis de Droit International Public.* Vol. II. Par R. PIEDELÈVRE. Paris: F. Pichon. 1895. 588 pp.—We have already noticed the first volume of this work. The present volume treats of international differences and the modes of settling them, and contains an interesting appendix on the Pope in connexion with International Law.

*A Practical Treatise on the Law relating to the Grand Jury in Criminal Cases, the Coroner's Jury and the Petty Jury in Ireland.* By WILLIAM G. HUBAND. Dublin: Edward Pousonby. London: Stevens & Sons, Lim. 1896. La. 8vo. xxxi and 1176 pp.

*The Practice and Forms in Winding Up Companies and Reconstruction.* By His Honour JUDGE EMDEN. Fifth Edition. By D. STEWART SMITH, assisted by HENRY JOHNSTON. London: W. Clowes & Sons, Lim. 1896. 8vo. lxxv and 806 pp. (28s.)

*A Treatise on the Law of Easements.* By JOHN LEYBOURN GODDARD. Fifth Edition. London: Stevens & Sons, Lim. 1896. 8vo. xxxix and 605 pp. (25s.)

*Select cases from the Coroners' Rolls, A.D. 1265-1413.* (Selden Society Publications, vol. 9.) Edited for the Selden Society by CHARLES GROSS. London: Bernard Quaritch. 1896. 4to. xlv, 132 and 159 pp.

*A Digest of the Law of Libel and Slander.* By W. BLAKE ODGERS, Q.C. Third Edition. London: Stevens & Sons, Lim. 1896. La. 8vo. lxxxvi and 841 pp. (32s.)

*Die Behandlung der Verbrechenskonkurrenz in den Volkerechten:* von Dr. HANS SCHREUER. Breslau: Wilhelm Koebner. 1896. 8vo. xii and 299 pp.

*The Annual Digest, 1895.* By JOHN MEWS. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1896. La. 8vo. xxxix and 15 pp. and 336 columns. (15s.)

*The Law and Practice of Licensing.* By G. J. TALBOT. London: Stevens & Sons, Lim. and Sweet & Maxwell, Lim. 1896. 8vo. xxiv. and 367 pp. (7s. 6d.)

*A Digest of the Law of Agency.* By W. BOWSTEAD. London: Sweet & Maxwell, Lim. 1896. 8vo. xxxvii and 394 pp.

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*The Editor cannot undertake the return or safe custody of MSS.  
sent to him without previous communication.*

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# THE LAW QUARTERLY REVIEW.

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## NOTES.

### THE INDIAN TRADERS QUESTION IN SOUTH AFRICA.

**R**ECENT events in the Transvaal have thrown into the shade a controversy as to the treatment of Her Majesty's Indian subjects residing in the South African Republic, which, after pending several years, was referred to the arbitration of Chief Justice De Villiers of the Orange Free State. The documents and award are published as a Parliamentary paper (1895, C. 7911), and deserve the attention of students of international law, as one or two rather novel and curious points are involved. About ten years ago the legislature of the Transvaal passed a law restricting the settlement and trading of Asiatics in various ways. The British Government objected to this as being an infraction of Article XIV of the Convention of London of 1884, which purports to secure the rights of 'all persons, other than natives, conforming themselves to the laws of the South African Republic.' Certain modifications were then made in the law, to which Her Majesty's Government assented. The arbitrator found, on the construction of the correspondence which had passed, that this assent was unqualified. Thereupon he held that, first, it was no longer open to Great Britain to argue that the law in question was in derogation of the Convention; and, secondly, the law so assented to was an ordinary municipal law of the South African Republic, and as such must be interpreted by the competent tribunals of the country, and alleged errors in law on the part of those tribunals could not be properly made a subject of complaint by resident aliens to the Government of their own country. Now it is conceivable that proceedings against residents in a foreign State in time of peace, purporting on the face of them to be the regular interpretation of that State's municipal law by its ordinary competent tribunals, might be so manifestly perverse as to be evidence of a policy of systematic oppression or hostility, and to warrant the Power or Powers of which the persons affected were subjects in treating the proceedings as a whole as what in the

language of diplomacy are called unfriendly acts. In this case the argument on behalf of Her Majesty's Government was not put so high as that, and the arbitrator's decision seems, on the materials before him, to have been quite correct.

On the other hand the Government of the South African Republic contended that the 'persons' within the protection of Art. XIV of the London Convention included only Europeans and their descendants, and that the British Government had therefore no *locus standi* to object to any restrictive legislation whatever as to the settlement or trading of Asiatics in the Transvaal. The arbitrator, while inclining to think that in fact the case of Indians and other Asiatic settlers was not present to the minds of the contracting parties at the date of the Convention, held that Her Majesty's Government was entitled to rely on the natural and literal meaning of its terms, and decided against the contention of the South African Republic. In this he seems to have been equally right.

F. P.

The main subjects discussed at the conference of the International Law Association, held at Brussels in October last, were (1) Rules for Treaty of International Arbitration; (2) Territorial Waters; (3) Conflict of law as to the rule of damages which should be adopted in collisions at sea caused by joint fault of both vessels; (4) Execution of foreign judgments.

With respect to (1), rules were adopted providing for (α) definition of the class of differences to be settled, (β) the constitution of the tribunal, (γ) where the place of meeting should be, (δ) the decision to be given by the vote of the majority, (ε) the appointment of agents for both parties, (ζ) the treaty to provide for settling of doubts as to the limits of the arbitrators' jurisdiction, (η) the mode of procedure, (θ) the production of documents, (ι) the inadmissibility of domestic documents, (κ) the admissibility of written depositions, (λ) the cross-examination of witnesses, (μ) the expunging of irrelevant evidence, and (ν) the delivery of the decision. The President, Sir R. Webster, pointed out that the justification for standing rules for arbitrations was the fact that the number of cases referred to arbitration in a period of sixty years previous to 1873, when the Association was founded, was forty, whereas in the last twenty-three years it amounted to seventy.

As regards (2), Mr. Barclay of Paris presented the report of a committee on the subject, proposing articles mainly the same as those already adopted by the Institute of International Law. The main provisions were as follows:—States have the right of sovereignty over territorial waters; territorial waters extend to six miles from

low-water mark, while in bays the limit was to be reckoned from a line drawn across the bay at the nearest place to its opening towards the sea where the distance between the opposite shores does not exceed ten miles; straits are territorial waters if not exceeding twelve miles in width, and may exceed that width if their entrances do not exceed it; ships of all nations, except men-of-war, are to have the right of passage over territorial waters except in case of war, when it can be closed for purposes of defence, with the exception of straits which join one open sea to another, which are always open; all ships in territorial waters not merely passing through are subject to the territorial jurisdiction, civil as well as criminal.

As regards (3), M. Franck of Antwerp and Dr. Raikes, Q.C., read exhaustive papers illustrating and criticizing the present conflict of law on the subject, and a resolution was carried declaring that the French and Belgian rule of apportioning the damages in proportion to the gravity of the fault committed by either ship was preferable to the German rule by which each ship bears its own loss, and the English rule by which each pays half the other's damages.

On the fourth subject, M. Brunard of Brussels and M. Lachau of Paris read papers, the former giving the Belgian law on the subject and proposing that members of the Association who were also members of legislative bodies should endeavour to introduce into the laws of their countries the text of the proposals adopted by the Association at Milan in 1883, the latter advocating treaties between different States as steps towards international unity on the subject. Mr. G. G. Phillimore read a paper stating the English law and practice. A committee was appointed to collect the provisions of the various legislations dealing with the question.

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When the framers of the Winding Up Act, 1890, brought that heavy piece of ordnance—the public examination—into the field, they confidently expected it to spread a panic in the ranks of fraudulent directors and promoters, and so it undoubtedly did. However, after failing to go off when wanted, it has now been effectually spiked by the House of Lords (*ex parte Barnes*, '96, A. C. 146, 65 L. J., Ch. 394), that is, for all purposes of use in legal warfare or winding up administration. The conditions are as impracticable as those prescribed by the fair Portia to Shylock for carving up Antonio. First, say the law lords, you—the Official Receiver—must find fraud, not at large, but against the particular examinee; and even when you have done that it will not entitle you

to summon any other of the directors, promoters, or depositaries of information. Naturally the Official Receiver exclaims, 'How am I to find fraud before I have elicited the facts, and if I do find fraud a fraudulent examinee is the last person from whom I am likely to get the truth?' But his sighs the gods dispersed into thin air, for the Olympian wisdom of the law lords concerns itself but to declare the law to mortals.

In truth, however, not many persons will grieve if the section is rendered unworkable. It was an ill-advised piece of legislation, founded on the false analogy of bankruptcy, and unfair to directors. The machinery of section 115 supplies, or with a little tinkering will supply, all that is really needed to secure the fullest investigation.

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*Hardaker v. Idle District Council*, '96, 1 Q. B. 335, 65 L. J., Q. B. 363 (C. A.), brings clearly into light a distinction which in practice it is not always very easy to follow, between the liability of a body such as a District Council for damage caused by the Council to a third person by the omission of the Council to perform some duty imposed upon it by law, and the liability of such a body for damage caused to a third person by the negligence of the servants of the contractor who is employed by the Council.

The law on this point may, it is conceived, be thus stated:

1. If a Council, or indeed any other body, is under a legal duty to the public, e.g. to keep up gas works, or to erect a bridge over which the public may pass safely, and the persons employed by the Council construct gas works from which the gas escapes, or build a bridge over which the public cannot pass safely, then if any person is damaged thereby the Council is responsible for the injury; the Council is liable not because of the negligence of the persons who have done the work, but because the Council has not performed the duty imposed upon it by law (*Hole v. Sittingbourne Ry. Co.*, 6 H. & N. 488; *Gray v. Pullen*, 5 B. & S. 970).

2. If a Council, or indeed any other body, employs a contractor to carry out work, e.g. to erect gas works, which the Council is under a legal duty to carry out, and in the course of this work damage is caused to a third person by the incidental negligence of one of the contractor's servants, e.g. by his letting a stone fall on a passer-by, the Council is not liable for the damage (*Reedie v. L. & N. W. Ry. Co.*, 4 Ex. 244).

The distinction may thus be summed up: A public body which employs a contractor to do work, e.g. erect a bridge, which the public body is bound to perform, is liable to third parties for damage caused from the work not being done, or, what is the same

thing, from its being badly done. A public body, on the other hand, which employs a contractor is not the employer of the contractor's servants, and is not (as an employer would be) liable for damage caused to third parties by the negligence of the contractor's servants in performing their work.

But, as remarked by Lindley L.J., it is not always easy to avoid mistakes in applying this or indeed any other principle to difficult cases. In other words, the distinction, though a real, is a fine one.

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*Lyons v. Wilkins*, '96, 1 Ch. 811, decides in effect that it is unlawful for men on strike, or the officers of their trade union, to 'picket' the employer's place of business even with two or three men, unless those men strictly confine themselves to informing persons who come there to offer their services to the employer, or to make inquiry, that there is a strike, and (we suppose, but we are not quite sure that the decision allows even this) what the matters in dispute are. If they use any kind of persuasion against working for that employer, even by the most peaceable argument and without threats of any kind, they are deemed to be watching or besetting the place 'with a view to compel' the employer, or the workmen who might be minded to serve him, or both, to abstain from doing or to do what they have a legal right to do or abstain from doing. So the Court of Appeal reads the Conspiracy and Protection of Property Act, 1875, s. 7, and it is emphatically so laid down, in particular, by Kay L.J. at p. 830. If such be the law, we are pretty sure it is not the law Parliament intended to make; and after carefully reading the judgments two or three times we are unable to see why persuasion cannot be distinguished both in fact and in law from compulsion. This and other recent cases of the same class ought certainly, in our opinion, to be reviewed by the House of Lords. We have great difficulty in reconciling some of the utterances of the Court of Appeal, especially the branch of it over which Lord Esher presides, with the principles laid down by that House in the *Mogul Steamship Co.'s* case, '92, A. C. 25.

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In *Clutterbuck v. Taylor*, '96, 1 Q. B. 395, 65 L. J., Q. B. 314 (C. A.), the majority of the Court of Appeal decided that a policeman who has the exclusive occupation of a cubicle in a dormitory at a police station does not thereby so occupy a part of a house as to be entitled to a vote at a Parliamentary election under the Representation of the People Act, 1884, s. 3. The decision depends on the exact terms of the Act and the peculiar circumstances of the



particular case, but it suggests a conclusion and a question of considerable general importance.

The conclusion is that a very slight change in the phraseology of the Acts conferring the Parliamentary franchise, or even apparently a slight change in the arrangements as to the quartering of policemen and soldiers, might confer a vote upon every policeman and upon every soldier stationed, at any rate for a length of time, in the United Kingdom.

The question is whether it is really desirable that soldiers and policemen should have votes. In several countries soldiers are, as such, excluded from the exercise of the franchise. In England they are not as such excluded, but a soldier in the ranks has, it is conceived, hitherto but rarely been able to fulfil the conditions required of a voter. The mass of the army, therefore, have not in practice been electors.

The exclusion, whether it be directly enacted or indirectly brought about, of policemen and soldiers from the body of electors is clearly expedient. The first duty of such officials is obedience to commands; the first duty of an elector is the expression of his independent judgment. The moral and mental attitude of a soldier is, and ought to be, quite different from that of a voter. But in arguing this matter we need not rely on grounds of principle. The practical effect of giving votes to the mass of the army would be to increase, and that in the most undesirable way, the power of any party which held office. A thousand, five hundred, or even a hundred votes are often sufficient to turn an election. If as a rule ordinary soldiers had votes, elections would be turned by the stationing of regiments. It needs no arguments to show that such a state of things would impair at once the efficiency of the army and the independence of Parliament.

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When Thackeray was at Brussels he would point out to a friend the hotel where Amelia and George and Dobbin stayed during the memorable Waterloo campaign. The persons and incidents of fiction—the world of imagination—have often, as we know, more reality for us than those of so-called real life. But dear as our friends of fiction are to us, we should still hesitate to describe them as ‘individuals’ though we had rather that than do them the indignity of describing them as a ‘word or words . . . not being a geographical name.’ The construction of the Trade Marks Act, 1883, however, is not a question of sentiment, nor is it the old controversy of Nominalists and Realists revived, and as a dry point of construction it is difficult to say that ‘*Trilby*’ is not a ‘word’ within s. 64 (1) (e) of the Act, especially as the subsection itself

by the geographical qualification shows that a 'word' may be a name (*In re Holt & Co.'s Trade Mark*, '96, 1 Ch. 711, 65 L.J., Ch. 410 (C.A.)). Looking at it apart from a microscopic examination of the clauses of the subsection, the policy of the Act is to give traders the greatest latitude of choice in the matter of trade marks which is consistent with respect for the rights of other traders and of the public. This is the liberty of English law, and there is this to be said for it in the case of trade marks, that the wider the field of choice the less excuse there is for infringement by similarity.

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*Tomlinson v. Broadsmith*, '96, 1 Q. B. 386, 65 L.J., Q. B. 308 (C.A.), decides that the managing partner of a business firm has implied authority to employ a solicitor to defend an action against the firm for the price of goods supplied to the firm in the ordinary course of business, and, further, that the solicitor so employed has, though the action is brought against the firm in the firm's name, authority to enter an appearance in the names of each of the partners individually (Ord. XLVIII A. r. 5), and is not bound to keep the partners, other than the managing partner by whom he is employed, informed of the progress of the action.

All this is good sense as well as good law. What is remarkable is that there should exist so little reported authority as there appears to be directly supporting conclusions the soundness of which can hardly be disputed. A student should constantly bear in mind that a great deal of English law consists, to use the expressions of an eminent judge, of 'law taken for granted.'

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*Gaskell v. Gosling*, '96, 1 Q. B. 669 (C.A.), repays and will receive careful study. The circumstances of the case are a little complicated, but the substantial question raised is whether, when trustees for debenture holders are under the deed of trust, empowered to appoint a receiver to carry on for the benefit of such holders the business of a company, the trustees are personally liable for debt incurred by the receiver, at any rate if incurred after the winding up of the company has begun. The Lord Chief Justice, the Master of the Rolls, and Lopes L.J. have held that the trustees are personally liable. From the judgment Rigby L.J. has dissented. To put the matter broadly, the Lord Chief Justice and the majority of the Court of Appeal have held that the trustees were undisclosed principals, and liable as such on contracts made by their agent, the receiver. Rigby L.J., on the other hand, holds that the receiver was not the agent of the trustees, and that from no point of view can they be held liable for his acts.

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Dogmatism is evidently out of place when eminent judges disagree, and when their judgments, it may be presumed, will soon be reviewed by the House of Lords. It is, however, allowable to remark that the dissenting judgment of Lord Justice Rigby is most carefully considered and is entitled to great weight. The liabilities, no less than the rights, of an undisclosed principal are in the strictest sense anomalies. They are, we believe, unknown in countries where the English common law does not prevail, and it is more than doubtful whether, could the matter be considered apart from authority, these anomalous rights and liabilities would be approved by English judges. Under this state of things it seems doubtful whether the liability of an undisclosed principal, especially when acting as a trustee, should be further extended. When *A* trusts *B* without even knowing of the existence of *C*, it is hard to see why *A* should be allowed to make *C* responsible for *B*'s breach of contract, and *A*'s claim is not made the stronger by the fact that *C* is acting as trustee for *X*.

*Andrews v. Mockford*, '96, 1 Q. B. 373, 65 L. J. Q. B. 302, C. A., is a decision of great importance for the company-promoting world. It shows that *Peek v. Gurney*, L. R. 6 H. L. 377, did not lay down a rule of law that a prospectus is necessarily addressed only to original applicants for shares. That is the normal course of things; but it may be the fact that the prospectus is used by the promoters for the purpose of creating a market for the shares after allotment, and in particular this may well be found as a fact where the prospectus is reinforced, so to speak, by subsequent representations of the promoters. If such representations are fraudulent, they may be regarded as making up, together with the prospectus, one continuing fraud; and its utterers will be answerable to a person who bought shares in the market on the faith of the prospectus and of its pretended confirmation.

A loan company lends *A* £3,500 at interest. *A* is unable to pay either capital or interest, and after four years the company realizes the security, which produces £3,000. How is this to be dealt with? According to the principle laid down by the Court of Appeal in *In re Hubbuck* ('96, 1 Ch. 754, 65 L. J., Ch. 271) the company ought to treat it as a receipt on account of the arrears of interest as well as on account of the capital of the loan, and apportion it between capital and profits. This proposition would, we think, surprise the directors and auditors. They would be more likely to write off £500 as a loss on capital account, and say nothing about the interest.

In *In re Hubbuck* the question arose between tenant for life and remainderman. The testator directed that the actual income of his residuary estate should, pending conversion, be paid to the tenant for life, his intention being to exclude both branches of the rule in *Howe v. Earl of Dartmouth* (7 Ves. 137, 6 R. R. 96), which, however equitable in theory, is inconvenient in practice. But he reckoned without his host, for the Court of Appeal said in effect: 'True it is that no interest has ever been paid on the £3,500 loan, but there is a rule in this Court that where the testator has not expressed an intention to the contrary, losses on account of capital and income must be apportioned between tenant for life and remainderman. Consequently the £3,000 which has been received consists partly of capital and partly of income, and the part which represents income must be treated as actual income within the meaning of the will, and be paid to the tenant for life.' Is there not a flaw in this reasoning? When we say that by a rule of the Court a sum is treated as income, this is surely the same thing as saying that it is only fictitious or imaginary income. How can it be actual income? If the testator had had the precise point in his mind it is difficult to see how he could have provided for it in more appropriate language.

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*In re Newton*, '96, 1 Ch. 740 (C. A.), cannot be said to add anything to the law on the religious education of children. English law has long ago recognized the father as supreme in this matter, capable of forfeiting though he cannot abdicate his paternal rights and responsibilities. It has as fully recognized the mischief of unsettling religious ideas, of which Gibbon is the stock example. But though embodying nothing novel in law *In re Newton* is a very instructive case as illustrating the working of the present system; and all the more from being—in a sense—typical. The father, that is, was an indifferent religionist—a professed Catholic, the mother a woman of fervent piety—a Wesleyan as it chanced: she might have been an Anglican or a Catholic or an Irvingite. This is the common relation of the parties—the father careless, the mother religious or at least more careful of religious observances. Inevitably in such a situation the children of the marriage come under the mother's influence and imbibe her faith. 'I am,' said Samuel Morley, 'what my mother made me,' and it has been so from the time of St. Augustine to William Cowper. Maternal love and tenderness mould the child's earliest ideas of religion, and when the father's scruples awaken it is too late. There is nothing to regret in this, but it points the irony of the situation. English law gives

the power and supremacy to the father. Nature gives it to the mother, and when these two come in competition we know which generally gets the best of it.

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In holding the balance between trustee and cestuique trust the Court has, as Lord Eldon observes, to recollect the importance on the one hand of securing the property of the cestuique trust, and on the other hand of not deterring men from undertaking trusts, 'from the performance of which,' adds the great Chancellor, 'they seldom obtain either satisfaction or gratitude.' Seldom indeed! The impudence of the claim, for instance, in *Chillingworth v. Chambers* ('96, 1 Ch. 685, 65 L. J., Ch. 343 (C. A.)) is but thinly disguised under the veil of legal technicalities. It was a disingenuous attempt by a beneficiary trustee who had instigated a breach of trust to get indirectly under the name of contribution or indemnity what he could not get directly. Putting on the mask or persona of cestuique trust he says to the trustees, 'you are answerable to me for the breach of trust.' This is undeniable. Then dropping the cestuique trust character and assuming the mask of trustee, he says to his co-trustee, 'we are in *pari delicto* in this matter; you must contribute your share to the loss,' conveniently ignoring the fact that the trustee who claims contribution is the same individual who instigated the breach of trust. The unconscionableness of the cestuique trust, however, is an old story. The real point of the case is, that where a cestuique trust instigates a breach of trust the trustee is entitled to be recouped to the whole extent of the cestuique trust's interest, not merely to the extent to which he has benefitted by the breach of trust. If this were not so it would make the redress as often as not illusory.

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Management is undoubtedly the weak point of co-operative enterprise. A director who takes his seat once or twice a month at a board meeting for an hour or two may be honestly desirous of doing his best for the company, but he cannot feel the consuming interest in the business which the ordinary trader feels whose livelihood depends on it. To the director the company is only one out of several irons which he has in the fire, and he can regard its fortunes with considerable equanimity. This *laissez-faire* disposition of directors would have received a fatal encouragement had the Court of Appeal held in *La Compagnie de Mayville v. Whitley* ('96, 1 Ch. 788 (C. A.)) that notice must be given to a director of the business to be transacted at a board meeting. The director's mental comment nine times out of ten would be, 'Oh! this business

is of no importance: they can get on without me.' So he stops away, with the result that important business turns up, and the company loses the benefit of the 'combined wisdom' of the board, perhaps falls into the hands of unscrupulous members of the board. Shareholders' meetings are quite different. Shareholders have a right to leave the company's affairs to the directors, and to assume that the directors are doing their duty. An appeal to them in the case of an extraordinary meeting is in the nature of a 'referendum,' and as such the particular issue ought to be placed clearly before them.

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*Caveat emptor* is a just rule for the buyer of a chattel, because he can see and handle his purchase, but it ceases to be just where the subject-matter of the sale is such a thing as a share or a lease, because the buyer's means of knowledge are not the same as the seller's. Hence the obligation of *bona fides* to redress the balance. The vendor of a lease knows all about the covenants it contains. The purchaser does not, and therefore if the covenants are unusual and onerous it is, on the plainest principles, the duty of the vendor to bring them to the notice of the purchaser. The vendor in *White and Smith's Contract* ('96, 1 Ch. 637, 65 L. J., Ch. 481) did not dispute this but he confessed and avoided the obligation, that is, he said that he had discharged it—had given the purchaser constructive notice—by having his solicitor present at the auction with the lease ready for inspection. If there were, indeed, a recognized custom of this kind, the purchaser might be bound by it, but no such custom was proved nor could be, for it wants the essential condition of reasonableness. It would require an Indian fakir's power of abstraction to peruse and master the conditions and covenants of a lease amid the dust and din of an auction room.

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No doubt the time will come when the restraint on anticipation will survive only as a curious relic of the subjection of women in a barbarous age, like the cucking-stool or the gossip's bridle; but at present it still has its uses, not only in preventing extravagant but irresistible Mr. Mantalinis from squandering their wives' fortunes, but also in saving married women from themselves—from their own extravagance. 'What they do,' said Chitty J., 'is, they involve themselves in difficulties and then make piteous affidavits' (*In re Pollard's Settlement*, '96, 1 Ch. 901, 65 L. J., Ch. 496) asking the Court to remove the bar under the power in the Conveyancing Act. The particular married woman who elicited this remark from the learned judge must be admitted to have been a disgrace 'even to her sex,' for not contented with twice getting help

from the Court, she had gone on to borrow £500 from a money-lender, and got her step-father, an old clergyman, to go surety: but in spite of 'piteous affidavits' and an execution at the rectory Chitty J. stood properly firm. The 'benefit of the married woman,' which is the foundation of the jurisdiction, is a phrase of large meaning, but henceforth married women will have to take notice that the Court does not regard it as being for their benefit to relieve them against the consequences of their own or their husband's extravagance.

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The time is coming when the whole question of the authority to be given for what may be termed the promotion of morality to municipal bodies, will require careful consideration. This is at least suggested by *Burnett v. Berry*, '96, 1 Q. B. 641, 65 L. J., M. C. 118, and other recent decisions on the validity of by-laws. In that case a by-law, under the Municipal Corporations Act, 1882, s. 23, which prohibited under a penalty any person 'from frequenting and using any street or other public place within the borough for the purpose of book-making or betting,' has been held valid. Now there is no sensible man who at the present time of day can regret that betting should be discouraged; but there are hundreds of sensible men who look with distrust on the tendency to enforce morality by law, and who hold with assurance that if legal penalties are imposed in support of morality, they should be imposed by the nation, and not by bodies which may represent merely local sentiment or prejudice. The language of Lindley L.J. in *Strickland v. Hayes*, '96, 1 Q. B. 290, 65 L. J., M. C. 55, will, if taken in its natural sense, command the assent of persons who distrust encroachments by law on the field of morality, and it is with some regret that we see Lord Russell of Killowen and Wright J. dissent from Lord Justice Lindley's temperate wisdom.

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*Clegg & Co. v. Earby Gas Co.*, '96, 1 Q. B. 592, 65 L. J., Q. B. 329, is a good instance of the way in which adherence to legal principle conduces to justice. The omission of the defendants to provide the plaintiffs with a sufficient supply of gas caused the plaintiffs undoubted damage. But the duty of the Earby Gas Co. to supply the plaintiffs with gas clearly did not arise from a contract. It followed therefore logically that, as laid down by the Queen's Bench Division, the plaintiffs, whatever other remedy they might possess, could not maintain an action for breach of contract. Some indignant layman will suggest that respect for logic has here caused practical injustice. The answer is given by Wills J. 'When

large numbers of persons are supplied with gas, the undertakers might speedily be ruined if any one could bring an action of this kind [i.e. for breach of contract] against them.' In other words, the dictates of logic coincide with the requirements of general expediency.

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It is satisfactory to learn from *Liddell v. Lofthouse*, '96, 1 Q. B. 295, 65 L. J., M. C. 64, that the place where a man regularly takes and gives bets is 'a place' within 16 & 17 Vict. c. 119, s. 3; but there is a touch of absurdity in the thought that one learned judge after another should have perplexed his own mind, and gone near to render the laws against public betting ineffective, by the effort to define what is meant by 'a place.'

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It is satisfactory to know, on the authority of *The Queen v. Riley*, '96, 1 Q. B. 309, 65 L. J., M. C. 74, that a cheat who obtains money by means of a telegram, the date of which was fraudulently misrepresented, can be indicted and convicted for the offence of obtaining money by means of a certain forged instrument, to wit a forged telegram; but the fact that two such judges as Lord Russell of Killowen and Vaughan Williams doubted whether the indictment was good, makes a reader feel that the effectiveness of the Criminal Law is much hampered by technicalities. There ought surely to be a broad and clear definition of forgery, which should include all offences substantially falling under that term. In the definition of criminal offences distinctions are out of place. No one can doubt that the prisoner Riley obtained money by a gross fraud and deserved punishment; it would have been a scandal if he had escaped the penalty due to his offence simply because the Forgery Act, 1861, s. 8, is obscurely drawn.

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Last year the puzzle of *Reg. v. Ashwell* recurred in an Irish Court, and led to no less divergence of judicial opinion (*The Queen v. Hehir*, [1895] 2 I. R. 709). The master of a ship pays a labourer his wages in what he—the master—thinks two £1 notes and some silver. One of the notes is really a £10 note. The labourer takes it innocently, finds out the mistake soon afterwards, and makes up his mind to appropriate the note. By five to four the Irish Court held that this was not larceny at common law. The judgments were, perhaps, more carefully and elegantly written than in *Ashwell's* case: see especially that of Gibson J. The lines of argument were much the same: the majority held that the prisoner had lawful possession of the £10 note by a real though



mistaken delivery (in which case he clearly could not steal it at common law); the minority that he had no possession at all, but a bare custody, until he discovered the mistake, when he took the £10 note, in the legal sense, for the first time. Mr. Justice Wright's view, which is different from both of these, and upholds the conviction on the ground that there was no delivery in the first instance, but there was a trespassory though excusable acquisition of possession, capable of being made felonious by subsequent *animus furandi* (Pollock and Wright on Possession, p. 210), was referred to, but, we submit, not adequately considered. The choice lies, we think, between this and the theory of no possession at all. Either way the conviction is right.

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*Hanks v. Bridgman*, '96, 1 Q. B. 253, 65 L. J., M. C. 41, and *Lowe v. Volp*, '96, 1 Q. B. 256, 65 L. J., M. C. 43, each uphold the validity of by-laws made by tramway companies with regard to the mode in which passengers must deal with their tickets. A passenger may be legally required by by-law either to deliver up his ticket or to pay the fare legally demandable for the distance travelled over, and a passenger may be fined who refuses to show his ticket to the inspector of a company. By-laws such as those upheld, though they may occasionally cause a little hardship to individuals, clearly ought to be enforced. It is hard that a traveller should be compelled to pay his fare a second time simply because he has lost his ticket, but it is clear that the precautions necessarily taken against fraud by tramway or railway companies would be rendered futile if passengers could at their will or caprice throw away their tickets or decline to show them.

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One of the most marked features of English as contrasted with foreign institutions is our habit of entrusting to Courts the exercise of functions which in their nature are rather executive or administrative than judicial. Take for example *Cook v. White*, '96, 1 Q. B. 284, 65 L. J., M. C. 46, and *Hewitt v. Taylor*, '96, 1 Q. B. 287, 65 L. J., M. C. 68. These cases decide points which are not in themselves worth special notice on the construction of the Sale of Food and Drugs Act, 1875. They show, however, that the whole working of the laws against the adulteration of food is in England made dependent on the view taken by the Courts of complicated and often obscure enactments. We may be almost certain that in France or Germany the effect of similar laws would in reality depend upon the action of State officials charged with the enforcement of sanitary regulations. The objections which lie against increasing the authority of

the executive power are patent to Englishmen. Still it is a question whether now that the intervention of the State in all matters of public concern, such for example as sanitary questions, is constantly being increased, it is not a mistake to turn the Courts into administrative bodies. Judicial officers, such as magistrates, are thereby forced to occupy themselves with questions that are not really judicial, and the vigorous enforcement of administrative measures is impeded by the fact that the pettiest question of detail may give rise to legal proceedings.

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*Strickland v. Hayes*, '96, 1 Q. B. 290, 65 L. J., M. C. 55, is a good example of the limits which the Courts place, and ought to place, on the legislative powers of local bodies. A County Council passed a by-law that no person should in any street or public place, or on land adjacent thereto, use profane or obscene language. The by-law has been treated as invalid, and this for two perfectly sound reasons. In the first place, the area to which the by-law extended was clearly too wide. In the second place, even if you omit the words 'or on land adjacent thereto,' still the by-law is unreasonable. It would as it stands make it penal for a person to swear or utter an indecent expression, even though he were alone and caused no annoyance to any one whatever. Lindley L.J. and Kay L.J. have clearly laid down that some words ought to be added importing that the acts forbidden must cause annoyance to others. It is one thing to forbid a man's annoying other people by the use of obscene or profane language, it is quite another thing to forbid obscenity or profanity. The distinction is elementary, but it is one which local bodies are likely to overlook and which should be forced upon their attention.

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- [A learned contributor sends these further remarks on *Culling v. Culling*, '96, P. 116, noted in our April number, p. 103, above. The novelty and curiosity of the point seem to justify recurrence to it.]

The decision that the old common law of marriage does, and the English Marriage Acts do not, apply to the solemnities of marriage on a British man-of-war on the high seas is probably right, but suggests a curious speculative inquiry. Is a British man-of-war to be considered 'English' territory or 'British' territory? Such a case as *Seagrove v. Parks*, '91, 1 Q. B. 551, implies that a man-of-war is part of England; but, if so, is it perfectly clear that the English Marriage Acts do not apply to a marriage on board a man-of-war, i. e. to a marriage celebrated in England? From some

points of view, however, it is difficult to maintain that a British man-of-war is 'English' rather than 'British' territory. But if we assume that a British man-of-war forms part, not of England, but of the United Kingdom, or possibly of the British Empire, then endless inquiries arise as to the law which in civil matters prevails on board ship. Is it the law of England exclusively or also the law of Scotland? Would a will be valid if made there in a Scottish form by a Scotsman domiciled in England? Has Lord Kingsdown's Act, 24 & 25 Vict. c. 114, any application to wills made on board ship; and if it has, how is it to be applied? Would the marriage between Mr. and Mrs. Culling, if contracted *per verba de praesenti*, or if the marriage ceremony had been gone through before a Presbyterian minister, have been valid? These and various other questions depend for their answer on determining whether the British Navy is or is not from a legal point of view a part of England, and this is a matter on which it may be suspected Scottish or Irish Courts might lean towards a different conclusion from that which would commend itself to English judges.

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When we are met by a covenant in a lease against carrying on any 'noisy or offensive trade, business, or profession' on demised premises, we are inclined to construe 'noisy' as meant to protect the ear, 'offensive' the nose. This gives a kind of logical symmetry to the covenant. But this materialistic construction of the word 'offensive' in a covenant as meaning some ill-smelling trade, soap-boiling, or currying, whereat 'the nose is in great indignation,' will not do according to the view of the Court of Appeal in Ireland (*Pembroke v. Warren*, [1896] 1 I.R. 76). It is not to be restricted to what is unpleasant to eye, ear, or nose. It must be interpreted *secundum subjectam materiem*. Therefore a private hospital set up in a fashionable square in Dublin is 'offensive,' because 'it causes a well-founded and reasonable annoyance.' A private lunatic asylum has been held in English law not to be an 'offensive trade' (*Doe d. Wetherell v. Bird*, 2 A. & E. 161), but that was because it was not a trade, not because it was not offensive. This enlarged view of 'offensive' will seemingly require the law to dip into aesthetics if it is to keep in sympathy with the growing sensibilities of the race.

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What, by the way, is the legal effect of the words 'not transferable,' invariably we believe to be found printed on a railway ticket? This is a point on which, from a public point of view, a legal decision is much to be desired. If the words mean anything, they

must, it would appear, mean that *A* can under no circumstances whatever legally assign his rights under a railway ticket to *B*; but if this be the effect of the words, then some odd results follow. *A* and *B* each take a ticket from Oxford to London. Owing to some confusion they exchange tickets. Assume that these facts can be proved, has the ticket collector the right to demand a second fare from each of them? Or take a more possible case: *A* and *B* each take return tickets from Oxford to London. *A* loses when in London the remaining half of his return ticket. *B* makes *A* a present of *B*'s half of *B*'s ticket and *A* returns with it to Oxford. Has the company in strictness a legal right to charge *A* on his return with the fare from Oxford to London on the ground that *B*'s ticket was not transferable to *A*? All these questions come round, it is conceived, to one inquiry. Does a railway ticket in any sense embody the contract between the railway company and the passengers, or is it at most only evidence of the contract having been completed? In America the better opinion seems to be that the ticket is the contract, and it has been maintained with great ingenuity that it is negotiable (Mr. Joseph H. Beale, junr., in Harv. Law Rev. i. 17).

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We learn from an article on the Draft Civil Code of the German Empire by Herr Alexander Meyer, in the May number of *Cosmopolis*, that as late as 1845 there were five different rules of succession in force in the city of Breslau. But an article by Mr. Edmund H. Bennett in the American Law Register for April discloses an even more chaotic state of things still existing in the marriage laws of various parts of the United States. In several jurisdictions the age of consent has never been raised from the old limits of fourteen and twelve years for husband and wife respectively, and in more than one the effect of legislation as to the form of solemnizing marriage has been nullified by holding the statutes to be merely directory. We cannot afford to make merry over the 'Provinzial-rechte' of the Continent while such anomalies are possible among English-speaking commonwealths.

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Lord Russell of Killowen's eloquence on the matter of legal education has produced, so far, little or no visible result. We can hardly say we are disappointed, for we did not expect anything better. The Benchers have stopped their ears, and if they will not listen to a charmer who charms so wisely as the Lord Chief Justice, it is not likely that anything short of the great guns of a Royal Commission will stir them. Meanwhile the Boards of legal studies

in the Universities, finding that the Inns of Court persistently refuse to treat with them on an equal footing, have properly desisted for the present from their attempts to obtain something like an adequate recognition of the work of their schools in the Bar Examination scheme.

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*It seems convenient to repeat in a conspicuous place that it is not desirable to send MSS. on approval without previous communication with the Editor except in very special circumstances ; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.*

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## FEUDAL SUZERAINS AND MODERN SUZERAINTY.

IT is proposed in the following pages to trace historically the connexion between the feudal and the modern ideas of suzerainty. No such investigation, it is believed, has been made. The article in Merlin's *Répertoire* deals with the purely French and feudal suzerain. That of Mr. C. Stubbs, in the *Law Magazine and Review* of 1882, applies feudal principles to modern suzerainty to a greater extent, as it seems to me, than the facts warrant. I shall consider: I. The origin and derivation of the word *suzerain* and the abstract form *suzerainty*; II. Its earlier history; III. Its application to state relations; IV. Modern suzerainty.

I. Direct evidence is wanting to show when, where, and by whom the word *suzerain* was coined. Indirectly it may be inferred as probable that it appeared about the beginning of the fifteenth century, at or near Angers. It is French; unlike the allied *sovereign* it has no cognate in the other Romance tongues, and no Low Latin form. It is commonly derived (by Littré and others) from *sus*—a derivation found in the Customs of Tours, 'qui vient du mot *sus*, pour dire qui est supérieur.' On the other hand, Pasquier (*Rech.* viii. 19) seems to treat it as identical with, and a mere corruption of, *souverain*. Again, the spelling in *sousserain estaige*, quoted by Godefroy from the archives of Angers in 1410, would suggest a derivation from *sous* in sense of 'sub-sovereign.' This, though it agrees with later French usage, does not fit in with the earlier meaning. Lastly, by a strange blunder, Furetière says, 'Ce mot vient de *Caesarianus*, selon Cujas et Pasquier.' As a matter of fact, Pasquier quotes only to reject the derivation by Cujas of *sergent* (not *suzerain*) from *Caesarianus*.

I am inclined to think that those who first framed and used the word combined the ideas of *sus* and *souverain* in one—perhaps even imagined that the latter was derived from the former. At all events they had not yet differentiated *suzerain* and *souverain* in meaning.

II. The earliest history of the word is found in the Customs. For the benefit of those who are not familiar with them it should be explained that they are, at least in their later development, *lex scripta* of which recensions were from time to time made by the three estates of the province or district in the form of a *procès-verbal*

confirmed by the king; many of these recensions dated between 1400 and 1600. While the majority are in French, a few are in Dutch, Spanish, or Latin. *Suzerain* occurs in the Customs of Bretagne (1456), Touraine (1506), Chartres (1508), Loudun (1517), Marche (1521), Bourbon (1521), Termonde (1611); also in those of Maine, Anjou, Tours, Poitou, all of uncertain date. In by far the larger number of the Customs it is not found as far as appears from De Richebourg's Coutumier Général or various works on local customs. When we consider that according to the standing maxim of the feudists custom was the 'règle principale des fiefs,' it is clear that the word at all events played very little part in the history of French mediæval feudalism. It was rare, provincial, local, and sporadic. If we draw a circle of moderate radius from Angers as a centre, it will enclose all the examples above given, except Bourbon in the south and Termonde in the north-east, the latter so late as 1611 under Philip III of Spain. Again, it is never used of the king, except as holder of a particular fief, e.g. 'le roi, comme duc d'Anjou, a ressort et suzeraineté.' It is almost confined to this *droit de ressort*, the reciprocal right of a suzerain to have appeals brought to his court and of the unsuccessful litigant to resort thither. Not however entirely so confined, for in 1506, in the Touraine, we hear that where a seigneur has *droit de moulin* the arrière-vassal as well as the vassal must resort to the suzerain's mill.

But the most important distinction between the early and late use of the word has still to be noticed. Some writers of the last and many of the present century habitually speak of *suzerain* and *vassal* as correlative, as an English writer would of *lord* and *vassal* or *lord* and *tenant*. This is unknown to the fifteenth, sixteenth, and seventeenth centuries. If *B* holds land of *A*, and *C* of *B*, then *A* is seigneur to *B*, and suzerain to *C*. *B* is vassal to *A*, and seigneur to *C*. *C* is arrière-vassal to *A*, and vassal to *B*. Feudal suzerainty required three persons. This alone proves that the word in the mouth of a modern international jurist has travelled very far from its original meaning.

It has been said that the word *suzerain* is rare in the Customs. To express the relation of *A* to *C* as above, by far the commonest term is *seigneur souverain*; also we find *seigneur supérieur*, *chef-seigneur*, *seigneur par-dessus*, or even *seigneur dominant*, *féodal*, or *direct* aided by the context. The evidence is strong that from 1400 to 1600 there was no difference in meaning between *souverain* and *suzerain* when joined to *seigneur* as adjectives, or as nouns referring to it. Neither word imported royalty, nor even supremacy, only superiority. Any one was sovereign or suzerain who had two ranks of vassals below him. The king might be so termed, not

as king, but as lord of some great fief. The lowest seigneur at the other end of the scale (the English tenant paravail) and the seigneur immediately above him were excluded by the definition. All other mesne lords were suzerain to some arrière-vassal. Yet the word itself did not become common till it was ceasing to have its original exact meaning. First the word *souverain* began to be confined to a few, and more particularly to the king. Soon after the middle of the sixteenth century we find Pasquier defining *souverains* as those originally 'qui tenoient les premières dignitez de la France, mais non absolument, nous l'avons avec le temps accommodé au premier de tous les premiers, je veux dire au Roy.' *Souverain* now denoted regality: we are passing away from the pure feudal system, where the distinction between royal and non-royal lords was not clearly drawn. *Suzerain* is now one who may be royal or not: the two terms are so far differentiated that the king as king is sovereign, as holder of some great fief is suzerain; a few great personages are both sovereign and suzerain; a number of others are suzerain only. As the royal power was consolidated and strengthened, the term suzerain was further limited to what we know as tenants *in capite*. 'Seigneurs Suserains,' says Furetière in 1727, 'sont les Ducs, Comtes, et autres grands Seigneurs possédans des fiefs de dignité, qui relevent immédiatement du Roi.' As a still living word of the last century, it stood for the right of certain great lords to have appeals from lower local tribunals brought to their courts before going to the *Parlements* as the ultimate Court of Appeal. Owing to the vigorous action of Henry II and other causes such a system never developed in England; the nearest counterpart is perhaps the old 'regalities' of the Counties Palatine. In France suzerainty had become little else than local appellate jurisdiction; it was the judge quite as often as the lord who was called suzerain. Even before the end of the sixteenth century Du Tillet writes: 'Le Suserain est le supérieur, ou le juge de ressort, autre néanmoins que le Roi. La Suseraineté est le droit de ressort que quelques grands Seigneurs du Royaume ont conservé.' And Pasquier applies the name to the king's judges in their appellate capacity—'Les juges royaux souverains que nous appelons maintenant suserains.' Montesquieu (edition of 1750) has 'Tribunal Suserain,' and of the aggrieved arrière-vassal he says, 'Il appelloit devant son Seigneur Suserain.'

Now the remarkable thing is that in the last century, while the present meaning of suzerain was being cut down and restricted to a few great peers, its application to past history was becoming extended. It was already beginning to be used as an equivalent for *seigneur*. Thus in Brussel's *L'Usage des Fiefs* (1727) we find



'Tout *Suzerain* avait cour plénière sur les vassaux,' while the title to the chapter runs, 'Tout *Seigneur* avait,' &c. This loose use of the word is still commoner in the present century. For instance, Meyer's *Institutions Judiciaires* (1823) has, 'On ne connaissait plus d'autre relation que celle de suzerain au vassal, et la règle, *nulle terre sans seigneur*, gouvernait presque tous les pays de l'Europe.' On the other hand Loisel (1846) uses the word strictly when he says, 'Le droit abandonné ou répudié [par un seigneur] était acquis et dévolu au seigneur suzerain, et ainsi de seigneur en seigneur répudiant jusqu'au roi.'

What was the origin of the *droit de ressort* which was the chief mark of suzerainty I am not here constrained to discuss. Du Tillet, we have seen, treats it as a right which certain great lords had succeeded in preserving. Loyseau, quoted by Merlin, describes it as 'usurpé par les particuliers,' calling suzerainty 'La dignité d'un fief ayant justice.' Pansey (1789) states, giving no authority, that before the reign of Philip Augustus (1181), on denial of justice by his seigneur, the vassal had no resource except to declare war. It was, he says, therefore laid down in this reign that in such case the vassal should be free to resort to the court of the *seigneur dominant*, i.e. the suzerain. Fustel de Coulanges (1890) seems to suggest a much older origin in the *immunités* granted in the seventh century, consisting in 'grants of local freedom from jurisdiction of the king's judicial officers. In a few cases, especially in some Flemish fiefs, I have observed that a different system of appeal prevailed, e.g. to the court of the *chef-bailly*, in lieu of the suzerain's court. It may here be remarked that in the last century there was a tendency in commentators to introduce the word suzerain where it was not found in the Customs themselves. Thus in Le Grand's *Coutumes de Flandres* (1719) we find in the index, 'fief-en-chef ou suzerain,' where the reference in the text has merely 'De tous les fiefs en chef,' as translation of 'Van alle hooft-leenen.' And in Maillart's *Coutumes d'Artois* (1756) is a note on Art. 33: 'Souverain Seigneur, c'est-à-dire Seigneur immédiat, dominant, ou suzerain.'

One word should be said on the relation of the suzerain (*stricto sensu*) to his arrière-vassal. Bouhier in his *Observations sur la Coutume de Bourgogne* (1742) tells us that it had been a vexed question *An sit vassallus vassalli mei meus vassallus?*, as to which he decides that 'L'arrière est uniquement Vassal du Vassal, et non du Seigneur suzerain,' at least as to feudal incidents of service and (generally) profit; nevertheless the *seigneur suzerain* has *domaine direct*, mediate it is true, but with possibility of becoming immediate, e.g. by failure of heirs of intermediate seigneur.

We have seen that the word *suzerain* in the truly feudal times was but local, and even rare in the Customs. So with other documents. For instance, no small part of Fontannon's collection of the *Edicts et Ordonnances des Roys* (1585) is concerned with fiefs, but the word *suzerain* does not occur. Nor does it in Berault's *Coustume de Normandie* (1548), nor in many other old French books treating of feudal law. Nor again in Maître Husson's great argument in the case of Noirmontiers (1668), reported in the *Journal du Palais*, even though it turned chiefly on the position of the king as overlord of certain seigneuries in his character of Comte de Paris. Had it been an official term of general use, we should have expected to find it in some of the treaties, grants, settlements, or wills preserved in the *Corps Diplomatique* or elsewhere. Such documents in the fifteenth century are full of collocations like '*Souveraineté et Seigneurie, Hauteurs et Dommages, Fiefs, Arrière-fiefs & Justice haulte*' (1420), or '*Droit de Superiorité, Souveraineté, autres droits quelconques*' (1495). And in the next century Francis I describes himself '*comme vray Comte & Souverain Seigneur d'iceux*' (1515). Again '*Fiefs, Hommage, Pairie & Serment de Fidelité, Ressort, Souveraineté sur le Comté d'Artois*' (1555). In 1550, Charles V, not as Emperor, but as Seigneur of Overysse, bestows Lingen on Anne d'Egmont, with condition that she and her subjects '*seront exempts de la Justice d'Overysse & ne ressortirent illecq aucune-ment*,' a clear case of abandoned suzerainty, but without express use of the word.

III. The notion of a state, clear enough in ancient times, was much obscured during the Middle Ages, and nowhere more than in France. It was not till recent times that the word *suzerain* was used to express even the relation of the king to the holders of great fiefs, as in Mably (1828), who writes (II. iv): '*Le roi, monarque dans toute la France, n'était encore (c. 1300) que le suzerain des ducs de Bourgogne, d'Aquitaine, de Bretagne, et du comté de Flandre,*' and again, '*On distingua dans la personne du prince deux qualités différents, celle de Roi et celle de Seigneur suzerain. Il n'y avait aucun Seigneur, à l'exception de ceux qui possédaient les arrière-fiefs de la dernière classe, dont aucune terre ne relevait, qui ne fût à la fois vassal et suzerain.*' He goes on to say that Hugh Capet and his successors themselves held fiefs of French nobles. Until it was possible to correlate *suzerain* with *vassal* instead of with *arrière-vassal*, there was no likelihood that any one would use the now familiar term '*suzerain state*.' *Vassal states* there were indeed in plenty. Bodin (1586) says, '*Si jura majestatis non habeant fiduciarii seu vassalli, paucissimi admodum Principes*

in summa potestate constituti reperiantur.' In his chapter on the relations of feudalism and sovereignty he describes 'novem genera tenuiorum adversus potentiores,' the first being states *in patrocínio* of others, the second not *in patrocínio* but tributary. Under one or other of these he seems to place all 'vassal states'—a classification hardly acceptable to modern jurists. Grotius (c. 1625) in his remarks on *imminutio imperii* carries the matter no farther. Vattel (1748) says, 'When *homage* leaves indefinite and sovereign authority in the administration of the state, and only means certain duties to the lord of the fee, or even a mere *honorary sovereignty*, it does not prevent the state being strictly *sovereign*.' Here the words italicized taken together present the whole idea of feudal state suzerainty. Such vassalage in earlier times had been extremely common, and, whether nominally real or personal, might mean little or a great deal, according to circumstances. This subject has been worked out in much detail in the above-mentioned article of Mr. Stubbs, especially as regards the different kinds of homage, of which it may be said that the majority of French writers of the eighteenth century, like Salvaing, in his *L'Usage des Fiefs* (1731), make only two, *homage simple* and *hommage lige*, omitting *hommage ordinaire*. I will here only remark that, if Dr. Lingard's authorities are right, there are two examples earlier than the time of John when English kings professedly submitted to vassalage, viz. in 1176 when Henry II is said to have submitted to the Papacy in the words 'a domino Alexandro papa et catholicis ejus successoribus recipiemus et tenebimus regnum Angliae,' and in 1194 when Richard I after delivery of his cap to the emperor received restoration of his crown to be held as a fief of the Empire on yearly payment of £5,000. There were, indeed, few states that had not at one time or another been at least nominally fiefs of the Holy See or of the Empire. And so close was the connexion between these two that Grotius tells us that during any interregnum of the Empire the Pope conferred investiture of fiefs of the Empire. As to Naples, the stock example of a vassal state enjoying sovereignty as given in our modern text-books, De Raynval tells us, 'Les États de Naples, cependant un certain tems, fiefs de l'Empire, sont aujourd'hui (1771) le domaine direct du Pape.'

I am, however, more concerned here with the question whether the term *suzerain* was ever till quite recently bestowed on the superior state. It is not in the earlier French edition of Bodin, nor indeed, for reasons already given, could it well be looked for till the eighteenth century. I cannot find it so applied in any of the jurists or commentators. Had it been in ordinary use, there are treaties of the last century in which it must have occurred.

Take for instance two treaties between Louis XIV and the Duke of Lorraine in 1704, to distinguish their respective subjects in certain villages held in undivided sovereignty, where the word is not used, and compare these with the letters patent of 1826 referred to below. Or the treaty of 1751 between the Duke of Lorraine and the Count of Linange-Heiderheim concerning 'certains fiefs qui relèvent immédiatement et qui sont dans les ressort et souveraineté du duché.' Still more noticeable is its absence not only in the Treaty of Aix-la-Chapelle of 1748, but in all the cessions and protests made in connexion therewith by almost every power, great or small, that was not party to the treaty, especially the protest made by the House of Condé in connexion with the Duchy of Montferrat, 'fief mouvant de l'Empire, érigé en Duché, possédé en toute Souveraineté.' The Treaty of Versailles in 1783 brings us very near the French Revolution, and is noticed here only out of contrast to the Treaty of Paris of 1814. In the former there is no mention of suzerainty. In the latter France renounces all rights of sovereignty, *souveraineté*, and of possession over all countries, &c., beyond the therein defined frontiers. I believe this is the first official recognition of the word in state relations, and again emphasize the fact that the date is *after* the Revolution. In 1826 occurred the publication of letters patent of the Duke of Saxe-Coburg given by De Garden, in which are the words 'ceux de nos vassaux et sujets qui se trouvent en le cas de changer de Souverain et Seigneur suzerain,' &c. This is a plain reference to feudalism, though not to a vassal state under a 'suzerain.' As to the treaty of 1814, there is no interpretation of the word *souveraineté*, and nothing to show whether it refers strictly to old fiefs of the kings of France, or is a mere 'general word' serving to sweep in every claim, however originating, to French domination beyond the frontiers. The conclusion is that up to the present century, though now so-called suzerain and vassal states were once common and still here and there remained, there was no well-recognized name for the former, while the latter were generally designated as fiefs, or the like. Meanwhile international law, not long born, was still struggling into growth and seeking for a terminology, for which French, now the recognized language of diplomacy, was a ready source.

IV. The present century has seen a revival of the words suzerain and suzerainty with changed meaning. It will be convenient to begin with the scientific jurists. Thus Heffter (1855) under the head of *Halbsouveränität*, after discussing federal union and confederation, proceeds to other kinds of modified sovereign autonomy, all of which his French translator Bergson describes as *très rares aujourd'hui*. These are (1) Voluntary restrictions on sovereignty or

state servitude (*Beschränkungen der Regierungsrechte*); (2) Agreements for mediatization and guarantee; (3) Feudal relations (*Lehnverhältnisse*); (4) Treaties of Protection. As to (3) he says: 'A power having granted a sovereignty in fief, the sovereign of the one thus voluntarily becomes the feudatory of the other. The constitution of a fief gives rise to certain private rights and certain reciprocal duties between the suzerain (*Lehnsherr, dominus feudi*) and the vassal, especially that of mutual fidelity . . . The right of the superior power is commonly called *Hoheit, Oberhoheit*, and also *Suzeraineté*.' And he refers to the case of Naples.

Bluntschli (1874) says: 'When the sovereignty of a state is derived from that of another state, and consequently to mark this filiation one of them stands as against the other in a certain subordinate relation, the first is called a vassal state, and the other the suzerain state. Consequently, in the domain of international law, the independence of the vassal state must necessarily be restricted.' He notices how Naples gradually became completely sovereign and even a great power, and further instances the German States in the Middle Ages till their position was altered by the Peace of Westphalia; also the vassal states of Turkey; Mahometan, as Tunis, &c.; Christian, as Servia and others. 'History,' he says, 'shows that vassal states tend to complete independence; this change, already worked out in Western Europe, is still working out in the Empires of Turkey and Japan.'

Fiore (1885) says: 'Suzerainty denoted the aggregate (*l'ensemble*) of rights which the feudal lord had over his vassal. It is now employed to indicate the rights of the Ottoman Porte over its Principalities, but one cannot say that it has any very clear and precise signification.'

Holtzendorff (1887), after remarking that 'the mediaeval foundation of the distinction between superior and inferior powers rested on the universality (*Weltherrschaftsidee*) of Papacy, Empire, and Caliphate, which has no longer any existence,' continues, 'The distinctive mark in suzerainty is international effective obligation of protection (*Schutzpflichtigkeit*). The suzerainty of the Porte has assumed a collective form (i.e. belongs to the Powers) as well as the form of protection of its autonomy (*Selbständigkeitsrechte*) against the Porte. This is particularly shown by arrangements as to military operations in the Sudan, as to revenue, &c., being carried on without reference to the Porte.'

Hall (1890) says: 'States under suzerainty of others are portions of the latter which during process of gradual disruption or by grace of their sovereign have acquired certain of the powers of an independent community, such as that of making commercial

conventions, or of conferring their exequatur upon foreign consuls ... A state under suzerainty of another, being confessedly part of another state, has those rights only which have been expressly granted to it.'

The very latest pronouncement on the subject is perhaps that of Professor De Louter in the *Revue de Droit International* for 1896, p. 122. The defining part, as I have exhibited the others in English, I will venture to translate: 'The term suzerainty served to indicate a kind of dependence shown chiefly in external relations, which were subject to the superintendence or even to the complete management of the suzerain; sometimes matters did not rest there, and the dependent state paid tribute or was obliged to endure a greater degree of interference in its affairs.' Suzerainty, he says, in feudal Europe involved fealty and homage: the term has been extended to the Mussulman world, and to the control of European Powers through their Colonies over imperfectly civilized peoples.

I have set out these six descriptions in chronological order, because a comparison of them shows that, while there has been a widening of the meaning attached to suzerainty, there has been a corresponding weakening of the connexion supposed to exist between feudal and modern suzerainty. Here two remarks only need be made. Bluntschli is mainly right that vassal states have a tendency towards complete independence, but surely Japan is an exception: the tendency there seems to be towards centralization and consolidation of the superior power over the Daimios. Again, Mr. Hall's view seems retrograde, and the idea of his last sentence as above quoted is, I believe, unwarranted and erroneous.

Turning now to treaties, we find in the Protocol of 1828, that is, fourteen years later than the above-named Treaty of Paris, instructions given by the Powers for settling terms of boundaries, tribute, indemnity, and relations of suzerainty *to be established* between the Ottoman Porte and the Greek Government. By Art. 12, in order 'to mark the relations of suzerainty, the Porte is to participate in the devolution of the Chief Authority in Greece, but only by investiture.' In the previous Protocol of 1826 was no express mention of suzerainty; Greece was to be 'a Dependence' of Turkey, and to pay tribute: and by the Treaty of London, 1827, the Greeks were to *hold* under the Sultan 'as under a *Lord paramount*.' These proceedings, especially the italicized words, show the first instance of a modern suzerainty brought about by the action of third parties.

By the Treaty of Paris, 1859, Art. 28, 'Servia shall continue to *hold* of the Sublime Porte in conformity with the Imperial Hats which fix and determine its rights and immunities placed hence-

forward under the collective guarantee of the contracting powers ;' and by Art. 22, 'Wallachia and Moldavia shall continue to enjoy under the suzerainty of the Porte and under the guarantee of the contracting Powers the privileges and immunities of which they are in possession.' This suzerainty was further regulated by a convention in 1858.

Mr. C. Stubbs is very anxious to make the case of Servia fit in with feudal conceptions, and to fix the moment at which it became a 'vassal state.' I think this is wasted labour. The Turkish Empire was modelled not on feudal principles ; rather is it comparable with that of the great king and his satrapies, or other Eastern Empires. Servia, like other provinces, was under a pasha, tax-collector for a despot. It revolted ; for a while there were both pasha and native chief, then under pressure from without Turkey withdrew the pasha, and the Powers dictated the conditions of semi-independence.

Noticing (to complete the European examples) that by the Treaty of Berlin, 1878, Bulgaria was to be 'an autonomous tributary Principality under the suzerainty of the Sultan,' we pass to Egypt. By the Convention of London, 1840, the hereditary Pashalick of Egypt was vested in Mehemet Ali on payment of tribute to the Sultan 'as his suzerain.' In *The Charkieh* (L. R. 4 A. & E. 59) it was held that the Viceroy was 'a subject Prince,' Egypt 'not even a semi-sovereign state,' mainly on five grounds:—(1) Egypt was named as a province in firmans ; (2) its army was part of the Ottoman army ; (3) taxes were levied in the name of the Porte ; (4) it had no separate *jus legationis* ; and (5) no separate flag. By firman in 1873 Nos. (2) and (4) were modified, Egypt being empowered to maintain armies and conclude *commercial* treaties. To the five points above should properly have been added (6) payment of tribute. Here again Mr. C. Stubbs, looking for feudal analogies and mindful that vassals of old owed military service, is delighted that Egypt in the seventies sent a contingent to the Russo-Turkish war. I do not here see any resemblance to the *ban et arrière-ban* ; if not under the express provisions of some firman, I fancy it was a matter of grace on Egypt's part, or say rather of policy.

Coming to South Africa, we see that it was agreed by the Convention of Pretoria, 1881, that the Transvaal Republic should enjoy 'complete self-government, subject to the suzerainty of Her Majesty.' By Art. 2 Great Britain reserves the right (a) to appoint a British resident ; (b) to move troops through the Transvaal in time of war or apprehended immediate war 'between the Suzerain Power and any foreign state or native tribe ;' (c) to control external relations including treaties and diplomatic intercourse

with foreign powers, the latter to be carried on through Her Majesty's diplomatic and consular officers. Here (a) was probably copied from Indian and other Asiatic precedents, (b) and (c) are 'state-servitudes,' marking it is true superiority or greater strength in the *respublica dominans*, yet such as might conceivably be arranged between independent and sovereign Powers. By the Convention of London, 1884, the relation was modified: 'suzerainty' was omitted in the preamble; new articles were to be substituted when ratified by the Volksraad. By Arts. 3 and 4, 'If a British officer is appointed to reside within the South African Republic to discharge functions *analogous to those of a Consular officer*, he will receive protection, &c.,' and 'no treaty or engagement with any state or nation other than the Orange Free State nor any native tribe east or west shall be valid until approved by Her Majesty.' Thus provisions (a) and (c) above are modified, and (b) annulled, while the 'British officer' is placed nearly but not quite on the footing of a consul in a foreign independent state.

There is no mention of suzerainty in the Act of 1858 establishing the direct power of the crown in India, but in the Interpretation Act, 1889, it is enacted that in subsequent acts "'India" shall mean British India together with any territories of any native prince or chief under the suzerainty of Her Majesty.' The relations of such Indian States to the British Crown depend on numerous treaties. Briefly, British control consists in (1) restraining their right of making peace and war, sending embassies, &c.; (2) limiting the amount of their armies; (3) compelling submission to presence of British resident; (4) regulating residence of Europeans among them; (5) deposition in case of internal misgovernment; and in some cases (6) tribute.

There are also treaty rights of protectorate and direct control over some states bordering on India, as Baluchistan and Sikkim. All these are often called 'feudatories,' and many of them 'Protected States.' Near the Straits Settlements, Perak and four other states are 'under British protection,' while Johore is a more independent power. The chief points in the Colonial Office letter sent to the Court on occasion of *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149, were that between Great Britain and Johore there are 'relations of alliance and not of suzerainty and dependence' including 'protection from external hostile attack,' the Sultan 'not to negotiate treaties or enter into any engagement with any foreign state.' The Court held the Sultan to be 'sovereign,' the agreement not to enter into treaties being in the opinion of Kay L.J. no abnegation of sovereign right, but merely a *condition* of protection.

Comparing the above instances, we get a fairly precise idea of



modern suzerainty. It is immaterial whether or not the *respublica serviens* is 'derived' from the *respublica dominans*, and whether the relation is constituted by simple convention between the parties, or imposed from without. What is essential is that there must be (1) a real restriction of sovereign rights as against the former in favour of the latter, and (2) no *quid pro quo* (or *semble* an obviously and highly inadequate consideration) moving from the latter to the former. And (3) in practice it will be found where this is so that (as a matter of fact rather than law) the convention will be unilateral, i. e. it will be easy for the superior to terminate it, and difficult or impossible for the inferior to do so.

Lastly and above all, (4) the scope and extent of the restriction on sovereign rights will be found in, and only in, the treaty, convention, or other public document whereby the suzerainty is constituted. Any relation satisfying these four conditions may be justly said to create a suzerainty in the modern sense; no other can; subject to these conditions one instance may differ very widely from another.

Taking Heffter's four classes and adding a fifth, agreements for tribute, a modern suzerainty may assume forms (1), (2), (4) and (5), or any combination of such forms. On the other hand, (3) Feudal relation in the strict sense is obsolete; Kniphausen, sometimes quoted as a surviving instance, is not a state; its lord has not figured in the *Almanach de Gotha* for a hundred years. The remaining classes are on the increase, though the suzerainties of the future may soon be wholly over non-European states.

The view here presented will not be welcome to all. First, to the strict Austinians as well as to disciples of that French school for whom sovereignty is 'simple and indivisible,' who cannot accept the saying of Maine, 'The powers of sovereigns are a bundle or collection of powers, and they may be separated one from another.' In the feudal days the vassal power might be sovereign; the modern so-called vassal is at most half-sovereign, if that. I am not concerned to defend this 'arithmetical form,' as Holtzendorff calls it; I take it as well known and shorter than proposed substitutes. The elements of sovereignty are divided between 'suzerain' and 'vassal'; neither is wholly sovereign in respect of the *respublica serviens*. Secondly, the fourth condition above laid down will be unwelcome to those with whom suzerainty is a blessed word of unknown potency to conjure with. The glamour is gone, if it is but a short term for expressing the conditions set down in black and white in a treaty. We read that Great Britain has not only treaty rights in South Africa but also certain undefined rights as 'suzerain' or as 'paramount.' If this only means 'predominant'

and determined so to remain, I have nothing to say against it, and it applies not only to our dealings with the Transvaal but equally so to our relations with the Orange State<sup>1</sup>. Supposing for a moment that the suzerainty of 1881 has not been effectually abrogated, or that under the Convention of 1884 there is a 'virtual' or 'implied' though not an 'express' suzerainty, in my view this does not carry us a hair's breadth beyond the articles of that latter convention. The mediaeval lord had certain fairly well-understood rights over his vassal irrespective of any express provisions. So has the lord of a manor, so has the landlord of a house let on lease. The modern suzerain has nothing beyond his treaty rights; it is his own fault if they are not wide enough—or the fault of his then ministers or representatives. If they do not work out as he wishes, he can remonstrate, threaten, even go to war, just as (and only just so far as) he can with an independent power.

It does not fall within the lines here marked out to discuss the view of Mr. McIlwraith in the April number of this REVIEW on the possible responsibility of a suzerain for the vassal towards other Powers. It is enough to remark that this is not confined to suzerainty properly so-called. For instance, I take it that Great Britain by accepting a curtailment of certain sovereign rights of the Sultan of Johore, over whom she does not claim suzerainty, is as responsible for the consequences (morally, that is) as she is for the behaviour of any Indian or Malay 'feudatory.'

The time has come for revising the juristic definitions of suzerainty. I submit that in 1896 it is both true and clear, which in 1881 or 1884 was equally true, if not so clear, that the suzerainty of to-day has nothing in common with that of the fifteenth or sixteenth centuries save its borrowed, yet not (etymologically) inappropriate, name.

W. H. H. KELKE.

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<sup>1</sup> There is no suggestion of suzerainty in any of the nine Articles of the Convention of Bloemfontein with the Orange Free State.

## SUZERAINTY: A REPLY.

A WRITER in the *Manchester Guardian*, who does me the honour to devote an article to my paper in the last number of this REVIEW on the 'Rights of a Suzerain,' accuses me of 'learned childishness,' of 'trying to walk through a brick wall with my eyes shut,' and so forth, because I endeavour to show that Her Majesty's Government has the right to interfere in the internal affairs of the South African Republic.

His principal objection to my argumentation—the only one which I think calls for a reply—is that the late Lord Derby's dispatch concerning the draft of the convention of 1884 contained a declaration that the effect of the convention was to render such interference inadmissible.

I am of course perfectly aware of the dispatch in question, but I did not think it necessary to allude to it, inasmuch as it is not, in my opinion, very material.

In the first place, it does not form part of the treaty itself, but is a mere vague statement of the general effect of the convention, in Lord Derby's opinion, which was powerless to bind all future ministries and which, apart from the terms of the convention itself, has probably no greater value than the declaration of a minister in the House of Commons concerning the intended effect of a Bill under discussion.

In the second place, my critic does not appear to be aware that many treaties establishing Protectorates *expressly* declare that the Protecting State shall not intervene in the internal affairs of the Protected State, and yet, notwithstanding such a provision (which is what English lawyers call 'common form' and French ones 'une clause de style'), it is generally admitted that the Protecting State has not only the right but the bounden duty to interfere *whenever its international responsibility becomes involved* (see, for instance, Heilborn in the *Revue de droit international*, 1896, no. 2, p. 174). So that even had there been an express clause in the convention, instead of a mere declaration by the minister who concluded it, the circumstance would not affect the argument. I may recall Lord Castlereagh's opinion that intervention by one state in the internal affairs of another is justifiable 'whenever the immediate safety or the essential interests of the former are seriously compromised by the domestic transactions of the latter' (G. F. de Martens, *Nouveau*

*Recueil de traités*, t. v. p. 598), and that of Phillimore that such intervention is admissible 'whenever the internal institutions of a state are incompatible with the peace and safety of other states.' My point is that Suzerainty, which is apt to be regarded merely as an attractive agglomeration of more or less ornamental rights and privileges without any corresponding liabilities to speak of, is, in reality, a two-edged weapon, capable of being turned against the holder, and that in the present instance, the interpretation put upon the 1884 convention by the minister who concluded it, or even an express clause in such convention, had there been one, would not be a sufficient answer to foreign governments whose subjects were injured by our non-interference, and who, relying upon the principles to which I have referred, maintained that we had failed in our international obligation to exercise those rights which are the attribute—as I submit the inalienable attribute—of the Suzerain Power.

MALCOLM M'ILWRAITH.

## DIGESTS OF CASES.

**T**HE increasing growth of case-law renders the issue of consolidated up-to-date Digests a matter of increasing importance, but it cannot be said that at the present time these Digests are in a satisfactory state. The last consolidated editions of Fisher's Digest and of Hurst's Equity Index are now more than twelve years old; most of the series of reports only issue Digests of a more or less fragmentary character; the Law Reports stand alone in having issued a Consolidated Digest, 1865-1890, which is now brought up to date by the 1891-1895 Supplement.

How comes it that when new editions of the Index to the Statutes are brought out every few years, there is no corresponding attempt to bring out new up-to-date editions of the Consolidated Digests? While quite admitting that in many ways the former stands on a somewhat different footing, I submit that the true cause which at present makes this impracticable is the imperfect system upon which these Digests are framed. If they were framed on such a principle that the entries in subsequent annual Digests could be inserted bodily in their appropriate places without any changes in the previous type, &c. (except such as were rendered necessary by alterations in the substance of the law), there is every reason to believe that new editions of a Consolidated Digest could frequently (and profitably) be issued.

The difficulties of the present system are best illustrated in the case of the most perfect Digests—those of the Law Reports to which I have referred. Passing by for the moment the immense size and complexity of these and the doubt as to whether, with it all, the cases on the statutes are arranged in the most convenient method, the gravest fault of the present system may be illustrated by considering the difficulties in the way of incorporating the 1891-1895 Supplement with the 1865-1890 Consolidated Digest. The 'Table of Cases' in the Digest contains at least 30,000 entries, each with a reference (in some cases more than one) to the column in which the case is set out, the 'Table of Cases followed, &c.,' has at least 7,000 references indicated by title, &c., and numerical position, and the 'Table of Statutes judicially considered, &c.,' contains fully 10,000 more compiled on the same principle. The cross-references

throughout the body of the Digest are also very numerous, 20,000 being probably a moderate estimate. To each of these classes must be added about a fifth more, corresponding to the 1891-1895 Supplement, and it will be seen that the mere consolidation of the two on the present system would (apart from any alterations in the substance of the law) involve the revision of fully 80,000 entries, none of which could be completed until the order of the cases under each title had been decided on, and of which about 35,000 could not be completed until the very column adjustment had been settled. And what will be the state of things, when the output of future years has vastly increased the material to be dealt with? No wonder that on such a system Consolidated Digests do not appear more often—the wonder is that they appear at all.

Is there no plan by which this complicated arrangement could be superseded, by which the latest Consolidated Digests could be brought up to date (save of course as regards alterations for changes in the law) merely by the appropriate insertion of entries taken from the subsequent annual Indexes, and by which a greater simplicity and clearness might be given to the whole? It is in the belief that there is such a plan and that it is easily practicable that the following suggestions are offered. They have special reference to the Law Reports Digests—for these are the best at present—but the principles are equally applicable to any others.

#### *Digests of Statutes.*

These should, I submit, be omitted, the Digest being confined practically to reported cases, and being framed on the assumption that the Index to the Statutes as well as the statutes themselves is available. The same remark applies to the case of the rules and orders. The treatment of both classes in current Indexes is dealt with later.

#### *Cases on the Statutes.*

These should be arranged under the statutes and sections to which they refer or in reference to which they were decided, being thus placed in a separate category from non-statutory cases. The statutes would, of course, be entered in chronological order.

Where one decision touches several statutes or sections it would naturally be entered under the principal one (or more than one if it was divisible) and cross-referenced under the others. Where a decision touches both a statute and also non-statutory law, it would be entered in like manner where most appropriate and cross-referenced from the other places.

*Principles of Interpretation.*—Cases involving general principles of interpretation should be entered under the appropriate statute and cross-referenced to the appropriate place in the non-statutory portion, or *vice versa*, as may be most expedient in the circumstances of each case.

*Repealed Acts.*—Decisions under these, unless they have lost all practical importance, should be entered in the usual way, repealed Acts being distinguished by a difference of type.

*Consolidating Acts.*—Decisions under the previous (consolidated) Acts should be entered with an appropriate note under the corresponding sections of the consolidating Act, and cross-referenced from the repealed Act or section.

*Codifying Acts.*—Where a codifying Act touches on the principle of a non-statutory case, that case should be entered as a statutory case under the corresponding section of the codifying Act with an appropriate note.

*Subsequent Legislation.*—Where a case has been overridden by subsequent legislation, an appropriate note should be added and the case cross-referenced under the new Act.

In suggesting the above principles of procedure it should, of course, be added that in many cases the entry of the superseded cases in the 'Table of Cases followed, &c.,' would be quite sufficient. In some cases an entry under the new statute (or section), simply to the effect that it supersedes the named case, would be an additional advantage.

To a limited extent these principles are recognized in the present system, but I submit that this is the simplest and most convenient basis for the full entries of statutory cases.

#### *Colonial and Local, &c., Acts.*

Decisions on these should be entered in separate tables, constructed and cross-referenced on the same principles.

#### *Cases on Statutory Rules and Orders.*

These should also in like manner be set out in a similar separate table, following, so far as the rules and orders under public general statutes are concerned, the system adopted in the official Index to these.

In the entries of statutory cases no attempt should be made to set out the statute or section, except for the quotation, e.g., of any phrase upon which the decision particularly turns. The compilation should, as before suggested, be made on the assumption that the statutes are available, and that the entry of the statutory case is by way of annotation.

This change would —

- (1) facilitate reference to these cases ;
- (2) produce the simplest and most perfect annotation to the statutes ;
- (3) dispense with a vast amount of rubrics, of entries, and of cross-references on the present system ;
- (4) facilitate revision in respect of consolidating and codifying Acts, repeals, &c. ; and
- (5) greatly simplify the treatment of the remainder.

*Non-statutory Cases.*

The present order of entry should be substantially adopted, the elimination of the previous classes greatly simplifying the work.

*Rubrics.*—These should be limited to title, sub-title, and distinguishing word or words, adding any further head under which a cross-reference seemed desirable. The whole rubric should be printed in heavy type.

*Arrangement of Entries.*—These should be in the strict alphabetical order of their rubrics throughout. Thus, titles would be in alphabetical order, the sub-titles under each title in alphabetical order also, the distinguishing words under each sub-title in the same, and, where it went that length, the subsidiary distinguishing word under each distinguishing word the same. This arrangement of entering cases in the strict alphabetical order of sub-title, sub-sub-title, &c., would dispense with the numeration-restraint of the present system both in entries and cross-referencing, and would enable future entries to be inserted in due place without affecting previous ones.

*Cross-references.*—These should be to the rubric of the entry, setting that out as far as necessary. The strict alphabetical arrangement of sub-titles, sub-sub-titles, &c., would supersede the necessity of numbering the entries, and the work of revising these numberings in future editions. The fact that every cross-reference to a case was to be found in the rubric of the entry would greatly facilitate revision for changes in the law.

*The Entries of the Cases.*

In many instances these might be made more concise than at present. If the entry of a case in (say) Judge Chalmers' book on the Bills of Exchange Act be compared with the corresponding entry in the Digest, the advantage will generally be seen to rest with the former.



While it is impossible to generalize, it may be suggested that the words 'the plaintiff,' 'the defendant,' 'the appellant,' &c., should be avoided as far as possible, the entry of the initial of each party with any further description that may be necessary being shorter and simpler; also that the detailed consequences of the decision should be omitted, unless they involve some further point of law.

*Printing.*—With regard to this important detail, greater convenience and clearness might be secured by printing the entries across the page (as in the Indexes to the Revised Reports) instead of in double column. The whole rubric might be printed in heavy type, specific words or phrases and any case followed, &c., in italics, and the name of and reference to the actual case in capitals (as at present).

#### *Table of Cases.*

The digest-references to these should be by statute, &c., and (with non-statutory cases) to title, sub-title, &c., under which each is entered. As much of the rubric as was required to easily distinguish the case should be quoted, the entry being kept within due limits by abbreviations.

This plan would be quite as precise as the present one; with cases entered under more than one head it would show at a glance which entry was wanted, and, above all, once done, the same entries would be good for all future editions.

#### *Table of Cases followed, &c.*

These should, I submit, be entered across the page, the entry of the case being followed by the effective word ('followed,' 'overruled,' &c.), and that again by the entry of the subsequent case (or statute) in the usual reference form. The digest-reference (if wanted) could be easily found in the preceding table. This arrangement would be much more convenient than the present one, and, once done, the same entries would be good for future editions.

#### *Table of Statutes judicially considered, &c.*

This would be superseded by the arrangement of statutory cases. It might, however, be well to insert in place of it a table of the statutes there entered, arranged in the alphabetical order of their short titles. This would, of course, also be good for future editions.

#### *Table of Titles.*

This would be much shortened and simplified, if indeed it could not be dispensed with altogether.

*Current Indexes.*

These should be framed—so far as the cases are concerned—on the same principle. The compilation of succeeding quarterly issues would be simplified in the same way as succeeding editions of the Digest, though on a smaller scale, and the entries in the final issues could be simply transferred to their proper places in the Digest.

The entries of statutes, statutory rules and orders, and Parliamentary papers should be made in separate tables. It might also be possible to arrange the entries (so far as the statutes and the rules and orders were concerned) on the same principles as are now adopted in the Indexes to the annual volumes of these, so that such tables would coincide in the final part for each year with these annual Indexes, which in turn would be periodically superseded (as at present) by their respective consolidated Indexes.

With a compilation arranged on these principles, the preparation of even the next consolidated edition of the Digest of Cases would be much easier than on the present system, for the whole work could be compiled and corrected in 'slips' (to use a technicality), later cases could be appropriately inserted without affecting the references and cross-references to the others, and the whole could be issued very shortly after the expiration of the period covered.

For subsequent editions the reform would be far more advantageous still, for, save for alterations rendered necessary by changes in the law, the previous edition could be brought up to date simply by the transference to it of the entries in the subsequent annual current Indexes, compiled on the same principle.

*Contemporaneous Consolidation.*

The Incorporated Council of Law Reporting have, with some success I believe, been endeavouring to secure the quinquennial issue of future editions of the Index to the Statutes, including the Chronological Table. The corresponding issue of the Consolidated Index to Statutory Rules and Orders is also most desirable, and could a Consolidated Digest such as I have suggested also be issued—all quinquennially and all in the same years—it would be an important step to the much-needed unification of law-references.

J. DUNDAS WHITE.

*The following draft illustrates the application of the method above described to some of the cases of last year:—*

#### TABLE OF CASES.

Borwick, Union Marine Insurance Co. v.,	[1895] 2 Q. B. 279...	INSUR. (M.)—Policy—Coll.
Cheesewright, Groome v.,	[1895] 1 Ch. 730 ... 22-3 V. c. 127	(Solicitors, 1860), s. 28.
Flood v. Jackson,	[1895] 2 Q. B. 21 ...	{ACTION (CAUSE)—Induc. discharge—mal. TRADES UNION—Tort of delegate.
Furness, Withy & Co. } v. White & Co. }	{[1894] 1 Q. B. 483 [1895] A. C. 40 }	... 57-8 V. c. 60 (Merch. Shipp. 1894), ss. 492-6.
Groome v. Cheesewright,	[1895] 1 Ch. 730 ... 22-3 V. c. 127	(Solicitors, 1860), s. 28.
Guilford v. Lambeth	{[1894] 2 Q. B. 832 [1895] 1 Q. B. 92 }	... 51-2 V. c. 43 (Cty. Cts., 1888), s. 65.
Jackson, Flood v.,	[1895] 2 Q. B. 21 ...	{ACTION (CAUSE)—Induc. discharge—mal. TRADES UNION—Tort of delegate.
Lambeth, Guilford v.,	{[1894] 2 Q. B. 832 [1895] 1 Q. B. 92 }	... 51-2 V. c. 43 (Cty. Cts., 1888), s. 65.
Lemmon v. Webb,	[1894] 3 Ch. 1; [1895] A. C. 1 ...	NUISANCE—abate.—trees.
Lloyd v. Nowell,	[1895] 2 Ch. 744 ...	VENDOR—contract—condit. precedent.
'Mecca,' The,	[1895] P. 95 ... 24 V. c. 10	(Admiralty Court, 1861), s. 5.
Nowell, Lloyd v.,	[1895] 2 Ch. 744 ...	VENDOR—contract—condit. precedent.
Official Receiver, <i>ex p.</i> , in re Thurlow (Lord)	{[1895] 1 Ch. 724 ... 46-7 V. c. 52	(Bkruptcy, 1883), s. 20 (1).
Thurlow (Lord), <i>in re</i> , <i>ex p.</i> Official Receiver	{[1895] 1 Ch. 724 ... 46-7 V. c. 52	(Bkruptcy, 1883), s. 20 (1).
Union Marine Insurance Co. v. Borwick,	[1895] 2 Q. B. 279...	INSUR. (M.)—Policy—Coll.
Webb, Lemmon v.,	[1894] 3 Ch. 1; [1895] A. C. 1 ...	NUISANCE—abate.—trees.
White & Co., Furness, } Withy & Co. v. }	{[1894] 1 Q. B. 483 [1895] A. C. 40 }	... 57-8 V. c. 60 (Merch. Shipp. 1894), ss. 492-6.

#### TABLE OF CASES FOLLOWED, &c.

Hammond v. Pulsford,	[1895] 1 Q. B. 223, <i>obsolete</i> ...	58 V. c. 5 (Shop Hours, 1895), s. 1.
Hawkaley v. Outram,	[1892] 2 Ch. 359, <i>distinguished</i> ...	Lloyd v. Nowell, [1895] 2 Ch. 744.
'India,' The,	32 L. J. Ad. 185, <i>overruled</i> ...	The 'Mecca,' [1895] P. 95.
Mackay v. Banister,	16 Q. B. D. 174, <i>distinguished</i> ...	Guilford v. Lambeth, [1895] 1 Q. B. 92.

## STATUTORY CASES.

## 3 &amp; 4 Vict. c. 65 (ADMIRALTY COURT, 1840).

s. 6. See 24 Vict. c. 10 (Admiralty Court, 1861), s. 5.

## 22 &amp; 23 Vict. c. 127 (SOLICITORS, 1860).

s. 28. A solicitor cannot obtain a charging order under this section if he has already accepted from his client a mortgage or other security for his costs in the pending action in which his client is a party. *GROOME v. CHEESEWRIGHT*, [1895] 1 Ch. 730.

## 24 Vict. c. 10 (ADMIRALTY COURT, 1861).

s. 5. These provisions apply to foreign as well as to British ships. *A* supplied coals to the *M.*, a foreign ship, at Alexandria and Algiers and advanced her canal dues at Port Said, and on the arrival of the *M.* in this country commenced an action *in rem* against her and arrested her. *Held*, that the Court had jurisdiction. *Semble* that in respect of the necessities supplied at Alexandria and Algiers the Court had also jurisdiction under 3 & 4 Vict. c. 65 (Admiralty Court, 1840), s. 6, those places being 'upon the high seas' within the meaning of that section. *The India*, 32 L. J. Ad. 185, overruled. *THE MECCA*, [1895] P. 95 (C. A. overruling Q. B. D.).

## 25 &amp; 26 Vict. c. 63 (MERCHANT SHIPPING, 1862).

ss. 66-72. See 57 & 58 Vict. c. 60 (Merch. Shipp., 1894), ss. 492-6.

## 46 &amp; 47 Vict. c. 52 (BANKRUPTCY, 1883).

s. 20 (1). Upon an application for adjudication of bankruptcy against a debtor under this section, the Court is not bound forthwith to adjudicate the debtor bankrupt, but may for good reason adjourn the proceedings under s. 105 (2); cf. s. 109. *THURLOW (LORD) in re, ex p. OFFICIAL RECEIVER*, [1895] 1 Ch. 724.

s. 105 (2). See s. 20 (1).

s. 109. See s. 20 (1).

## 51 &amp; 52 Vict. c. 43 (COUNTY COURTS, 1888).

s. 65. This section applies, even though a counterclaim for unliquidated damages is set up. *Mackay v. Banister*, 16 Q. B. D. 174, distinguished. *GUILFORD v. LAMBETH*, [1895] 1 Q. B. 92 (C. A. affirming [1894] 2 Q. B. 832).

## 55 &amp; 56 Vict. c. 62 (SHOP HOURS, 1892).

s. 4. The omission of a penalty in this section (*Hammond v. Pulsford*, [1895] 1 Q. B. 223) is supplied by 58 Vict. c. 5 (Shop Hours, 1895), s. 1.

## 57 &amp; 58 Vict. c. 60 (MERCHANT SHIPPING, 1894).

ss. 492-6. Under the corresponding ss. 66-72 of 25 & 26 Vict. c. 63 (*Merchant Shipping*, 1862) it was held that where a shipowner deposits cargo with a warehouseman subject to a stop for freight under these provisions, and the consignee deposits the freight with the warehouseman and takes delivery of the goods from him, there is not to be inferred from such acceptance any contract by the consignee to be personally liable for the freight, and the Act creates no such liability. In these circumstances a consignee who is so named in the bill of lading, but who has no property in the goods, and who takes delivery only as agent for the owner, is not liable for freight. *FURNESS, WITHEY & CO. v. WHITE & CO.*, [1895] A. C. 40 (reversing C. A., [1894] 1 Q. B. 483).

## 58 Vict. c. 5 (SHOP HOURS, 1895).

s. 1. Remedies a defect shown by *Hammond v. Pulsford*, [1895] 1 Q. B. 223.

## NON-STATUTORY CASES.

**ACTION (CAUSE OF)**—inducing discharge or non-employment—malice—master and servant. An action will lie against a person who maliciously induces a master to discharge a servant from his employment if injury ensues thereby to the servant, though the discharge by the master does not constitute a breach of the contract of employment. An action will also lie for maliciously inducing a person to abstain from entering into a contract to employ another, if injury thereby ensues to that other. **FLOOD v. JACKSON**, [1895] 2 Q. B. 21 (C. A.). See also **TRADES UNION**—tortious act of delegate.

Collision Clause, see **INSURANCE (MARINE)**—Policy.

Condition Precedent, see **VENDOR AND PURCHASER**—Contract.

Contract, see **VENDOR AND PURCHASER**.

**INSURANCE (MARINE)**—Policy—Collision Clause—Piers. *U.*, the insurer of a vessel, re-insured her with *B.* 'against risk or loss or damage through collision with . . . piers or stages or similar structures.' The vessel was driven by storm against a sloping bank formed outside a breakwater (to protect the breakwater) by laying down loose boulders, and was totally lost. *U.* paid as for a total loss. *Held*, that *U.* could recover against *B.* under the clause. **UNION MARINE INSURANCE CO. v. BORWICK**, [1895] 2 Q. B. 279.

Master and Servant, see **ACTION (CAUSE OF)**—inducing discharge.

TRADES UNION—tortious act of delegate.

**NUISANCE**—abatement—trees overhanging. The owner of land which is overhung by trees growing on his neighbour's land is entitled, without notice, if he does not trespass on his neighbour's land, to cut the branches so far as they overhang, though they have done so for more than twenty years. **LEMMON v. WEBB**, [1895] A. C. 1 (affirming C. A., [1894] 3 Ch. 1).

Policy, see **INSURANCE (MARINE)**.

**TRADES UNION**—tortious act of delegate—responsibility of members—master and servant. The members of a trades union are not responsible for the tortious acts of a district delegate. **FLOOD v. JACKSON**, [1895] 2 Q. B. 21 (C. A.). See also **ACTION (CAUSE OF)**—inducing discharge.

Trees overhanging land, see **NUISANCE**—abatement.

**VENDOR AND PURCHASER**—contract—condition precedent—waiver. *L.* and *N.* signed a memorandum purporting to be an agreement for the sale by *L.* to *N.* and the purchase by *N.* from *L.* of a house at a stated price, 'subject to the preparation by the vendor's solicitor and completion of a formal contract.' *N.* repudiated the agreement. *Held*, that *L.* could not waive the condition, and that the agreement was not enforceable against *N.* **Hawksley v. Outram**, [1892] 3 Ch. 359 distinguished. **LLOYD v. NOWELL**, [1895] 2 Ch. 744.

Waiver, see **VENDOR AND PURCHASER**—contract—condition precedent.

## SEISIN.

IN his discourse on 'The Vocation of the Common Law,' recently printed in this REVIEW<sup>1</sup>, Sir Frederick Pollock, in speaking of 'the Germanic idea which lies at the root of our whole law of property, the idea of seisin,' remarks: 'So much has this idea been overlaid with artificial distinctions and refinements in the course of seven centuries, that it is possible even for learned persons to treat it as obsolete. Nevertheless it is there still.' The learned persons here referred to cannot be said to proclaim their faith on the housetops. Certainly no expression of such a belief is to be found in the works of modern writers on real property law<sup>2</sup>; on the contrary, they all treat seisin as an essential part of the existing law. So recently as 1877, the late Mr. Joshua Williams delivered a course of practical lectures to students in conveyancing under the title of 'The Seisin of the Freehold.' All living writers on real property law also treat seisin as a fundamental part of it. It may be instructive to inquire which of these contending parties is right: those who consider seisin as the basis of our modern law, or those who think that it is obsolete. It may perhaps be found that the truth lies somewhere between the two extremes.

Much light has recently been thrown on the meaning and importance of seisin in the early stages of our law by Professor Maitland and others<sup>3</sup>, but for the present purpose it is unnecessary to go back farther than the latter part of the last century. Even then there was much discussion as to the true nature of seisin and disseisin.—'The more we read,' said Lord Mansfield in 1757, 'unless we are very careful to distinguish, the more we shall be confounded<sup>4</sup>.' His definition of seisin is as follows: 'Seisin is a technical term to denote the completion of that investiture, by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass<sup>5</sup>.' Butler<sup>6</sup>, Preston<sup>7</sup>, and

<sup>1</sup> L. Q. R. xi. 323.

<sup>2</sup> *Distinguo*. All—or nearly all—writers on the law of real property are learned, but not all learned persons know their real property law. I purposely named no names and gave no examples at Harvard, nor shall I now. The idea to which I referred was the genuine idea of seisin as possession recognized by law, before it had been sophisticated by a series of fictions. I quite agree with Mr. Sweet that the tendency of modern law is to restore this.—F. P.]

<sup>3</sup> The Seisin of Chattels, L. Q. R. i. 324; The Mystery of Seisin, ii. 481; The Beatitude of Seisin, iv. 24, 286; Pollock and Maitland, History of English Law, ii. 29 seq.

<sup>4</sup> *Taylor v. Hords*, 1 Burr. p. 110.

<sup>5</sup> Note to Co. Litt. 266 b.

<sup>6</sup> *Ibid.*, p. 107.

<sup>7</sup> Abstracts, ii. 281.

Cruise<sup>1</sup> use the same language. Many modern writers define seisin as the feudal possession of an estate of freehold, while others define seisin as the possession of a freeholder, without laying stress on its feudal nature<sup>2</sup>. It may indeed be doubted whether the older writers did not use the word 'feudal' as a kind of warning to prevent the reader from thinking that any concise definition of the term could give an accurate notion of what it imports. Be that as it may, none of the definitions cited above are wholly satisfactory. Lord Mansfield's definition is more applicable to the ceremony of livery of seisin than to seisin itself, while the definition of seisin as possession does not lay sufficient stress on what is really the most important element in seisin—the element of title<sup>3</sup>. Preston recognized this element, for after defining seisin in the language used by Lord Mansfield, he adds: 'Seisin is correctly investiture, or an estate in the land, according to the feudal relation. . . . A man who has a seisin necessarily has an estate<sup>4</sup>.' A still more complete description of seisin is to be found in Mr. Lightwood's work on the Possession of Land<sup>5</sup>: 'Like the *possessio* of the Roman law, seisin is ascribed only to a person who possesses as owner—in the language of the English law, as freeholder.' Seisin 'touches not only the possession, but the title. Under the old law the owner who was not seised, in addition to losing the beneficial enjoyment of the land, lost also many important incidents of his right of property<sup>6</sup>.'

It is for want of keeping in mind this twofold aspect of seisin that a certain amount of ambiguity and confusion has crept into our books. Let us first see how far seisin, considered as the feudal possession of a person having a freehold estate in land, is still of practical importance in our law.

About six months ago the present writer had occasion to draw a charter of feoffment for the conveyance of a piece of land by an infant under the custom of gavelkind. Precedents of feoffments are to be found in several modern works on conveyancing, but dim recollections of certain inconvenient qualities peculiar to this mode of assurance suggested the advisability of referring to some work of

<sup>1</sup> Digest, i. 58.

<sup>2</sup> Watkins on Descents, 108; Williams on Real Property (third edition), 78, 116; seventeenth edition (by Mr. T. Cyprian Williams), 35; Seisin of the Freehold, 2; Challis, Real Property, 54.

<sup>3</sup> In the old books 'seisin' and 'freehold' are almost synonymous terms: see Littleton, § 448; Co. Litt. 266 b. 'In the most solemn acts of law, we express the strongest and highest estate that any subject can have by these words: "he is seised thereof in his demesne as of fee."' Bl. Comm. ii. 105.

<sup>4</sup> Preston, Abstracts, 282.

<sup>5</sup> P. 5. See also Pollock and Wright on Possession, 47 seq.; Challis, R. P. 205 seq.

<sup>6</sup> Lightwood, 42.

greater antiquity. Every diligent student knows that a feoffment derives its efficacy from 'the livery of seisin evermore inseparably incident to it'<sup>1</sup>: that livery of seisin is 'a solemnity or overt ceremony,' and that it must be made according to certain rules, 'for this is of the essence of a feoffment'<sup>2</sup>, but the student, and still more the practitioner, may be excused if he does not carry these rules in his head. The feoffor must have possession of the land. If any person claiming an estate in it is present when livery is to be made, he must join in the livery or be removed from the land, unless he is a lessee for years, in which case his assent is sufficient<sup>3</sup>. Where two parcels of land comprised in one feoffment are in different counties, or leased to different tenants, livery must, as a general rule, be made of each parcel separately<sup>4</sup>. As to the livery itself, it must be made openly, in the presence of witnesses, and by apt spoken words, accompanied by some act or gesture showing an intention on the part of the feoffor to give, and on the part of the feoffee to take, possession of the land<sup>5</sup>. Going on the land with the feoffee and giving him the charter of feoffment, is usually sufficient to show such an intention on the part of the feoffor, if he also uses apt words, but 'livery that hath an act or ceremony in it is the best, because it taketh the deepest impression in the witnesses. The most usual, formal and orderly manner of making of livery of seisin is thus, that the feoffor, donor, &c., and the feoffee, donee, &c., if they be present, or in their absence their attorneys or servants that have authority, do come to the door, backside or garden, if it be a house, if not, to some part of the land where seisin is to be delivered, and there, in the presence of many good witnesses, do show the cause of their meeting, and openly and plainly do read the deed, or declare the contents thereof, and of the letter of attorney, if there be any. And then the feoffor or his attorney (if it be a house) do take the ring, latch or hasp of the door (all the people, men, women and children being out of the house): or (if it be a piece of ground) do take a clod of the ground, or a bough or twig of a tree or bush growing thereupon, and (all the people being out of the ground) the same ring, &c., clod, bough, &c., with the deed do deliver to the feoffee, donee, &c., or to his attorney, and in the delivery thereof do use these words, or some such like words, viz. "I deliver these to you in the name of seisin of all the lands

<sup>1</sup> Sheppard's Touchstone (Preston's edition), 203, 204.

<sup>2</sup> Ibid. 209.

<sup>3</sup> Shepp. 213; Perkins' Prof. Book, §§ 218 seq. As to livery within the view, which need not be here considered, see Bacon Abr. Feoffment (A).

<sup>4</sup> Shepp. 207.

<sup>5</sup> Shepp. 214; Co. Litt. 48 b; Sharp's Case, 6 Rep. 26; Thoroughgood's Case, 9 Rep. 136 b; Vaughan v. Holdes (1605), Cro. Jac. 80; Maund's Case (1608), Ley, 2; Challis, R. P., 365 seq.



and tenements contained in this deed, to have and to hold according to the form and effect of the same deed." Or, "I deliver you seisin and possession of this house, or ground, in the name of all the lands contained in the deed, according to the form and effect of the deed." And then, if it be a house, the feoffee, &c., doth enter in first alone, and shut the door, and then he doth open it and let in others<sup>1</sup>.

These are the formalities used in ordinary cases. Where the feoffment is made by an infant under the custom of gavelkind there is an additional requirement, namely, that the infant must deliver seisin *propria manu*, and not by attorney, and especial care must be taken that the ceremony is duly performed, for the custom is strictly construed<sup>2</sup>.

The survival of this picturesque mode of conveying land is sufficient proof, if proof be needed, that seisin is a living part of our real property law. But the very contrast between a feoffment and an ordinary deed of grant also shows how little seisin counts for in matters of conveyancing at the present day. Nothing can be less ceremonious or picturesque than the 'completion' of an ordinary purchase. Even where the lord of a manor admits a tenant to copyholds and grants him 'seisin by the rod,' the ceremony generally takes place in a dingy office, the lord is represented by his steward and the 'rod' by an office ruler or an umbrella. Moreover, this is only customary seisin, and not seisin of the freehold. (The history of modern conveyancing consists of a series of successful devices invented by conveyancers for the purpose of avoiding the necessity of the 'overt ceremony' of livery. The success of these devices has been frequently lamented, but it has been ratified by the legislature, and now, for all purposes of ordinary conveyancing, seisin is completely obsolete.) It is true that in theory every assurance taking effect under the Statute of Uses depends for its operation on the seisin of a grantee to uses, but the amount of seisin required for this purpose is so extremely small that it is little more than nominal<sup>3</sup>.

Seisin, however, was formerly of importance in matters uncon-

<sup>1</sup> Shepp., Touch. 214, 215.

<sup>2</sup> Challis, Essay on Assurances (prefixed to the fifth edition of Comyns on Abstracts), 52. See *Re Maskell and Goldfinch*, '95, 2 Ch. 525, where the Court refused to force upon a purchaser a title depending on a feoffment by infants.

<sup>3</sup> The nature of the seisin required to put the Statute of Uses in operation and to keep it in operation, was formerly much discussed: see *Chudleigh's Case*, 1 Rep. 120; *Brent's Case*, Dyer, 340; *Yelverton v. Yelverton*, Cro. Eliz. 401; *Wegg v. Villers*, 2 Rolle Abr. 796; *Fearne on Cont. Rem.* 286 seq. As to the doctrine of *scintilla juris*, see *Sanders on Uses*; *Hayes, Int. to Conveyancing*, and the early editions of *Sugden on Powers*. Ever since the Stat. 8 & 9 Vict. c. 106 was passed, it seems to have been assumed without question that a deed of grant of freehold land in possession vests in the grantee a sufficient seisin to support uses taking effect under the Statute of Uses. The nature of the seisin which passes by such a deed is referred to *infra* (p. 245) in connexion with the law of curtesy.

nected with the conveyance of land by absolute owners. In order to clear the ground it is worth while to consider these matters for a moment, even at the risk of stating some elementary propositions. Dower, as well as curtesy, formerly depended on seisin. Seisin was the basis of the law of descent, for descent was traced from the person last seised. Seisin was essential to a devise of land, for if the testator was disseised of the land, whether at the time of making his will or at the time of his death, the devise was void. Fines and recoveries, and consequently the validity of dispositions by tenants in tail and married women, depended on the question of seisin. Fines were also used to confirm possessory titles, whence it followed that the goodness of a title by adverse possession might depend on the question of seisin. Apart from this mode of obtaining a title by adverse possession, it may be said that the law of limitation in former times depended ultimately on seisin, for though in most cases a man who had been in adverse possession of land for twenty years was practically safe from attack, yet he was often liable to have the land recovered from him in a real action, and all real actions were founded on seisin. The learning as to descent cast, the acquisition of seisin by mere entry and continual claim, and the rule prohibiting the assignment of choses in action real (i.e. rights of entry and action in respect of land) also belong to this branch of law.

Theoretically, therefore, seisin was of great importance, but practically this importance was much diminished by rules and presumptions of law, invented or sanctioned by the judges for the purpose of avoiding the practical inconvenience caused by the doctrine of seisin. Thus a feoffment was frequently allowed to take effect as some other kind of assurance (e.g. a covenant to stand seised) in order to cure some informality in the livery of seisin<sup>1</sup>. If the execution of a feoffment could not be proved, possession of the land by the feoffee for twenty years gave rise to a presumption that livery of seisin had been properly made<sup>2</sup>. An actual ouster of one tenant in common by another would be presumed from a similar length of possession<sup>3</sup>, and uninterrupted possession for twenty years was *prima facie* evidence of an absolute title<sup>4</sup>. Some of these rules appear to be applications of a much wider principle, viz. that mere possession is *prima facie* evidence of a seisin in fee<sup>5</sup>. These rules were invented for the express purpose

<sup>1</sup> *Doe d. Lewis v. Davies* (1837), 2 M. & W. 503.

<sup>2</sup> *Doe d. Wilkins v. Marquis of Cleveland* (1829), 9 B. & C. 864.

<sup>3</sup> *Doe d. Fisher v. Prosser* (1774), Cowp. 217.

<sup>4</sup> *Stokes v. Berry* (1699), 2 Salk. 421; s. c., sub nom. *Stocker v. Berry*, 1 Lord Raym. 741; *Denn d. Tarzwell v. Barnard* (1777), Cowp. 595.

<sup>5</sup> *Allen v. Rivington* (1671), 2 Saund. 110 a; *Jayne v. Price* (1814), 5 Taunt. 326;

*Doe d. Carter v. Barnard* (1849), 13 Q. B. 945; *Asher v. Whitlock* (1865), L. R. 1 Q. B. 1; Williams on Seisin, 7.

of getting rid of the inconvenient doctrine of seisin. The great obstacle in the way of protecting adverse possession not based on seisin was the existence of real actions and proceedings by fine and non-claim. The judges did their best to render these remedies harmless by making their use difficult and dangerous. The Commissioners on the Law of Real Property, in their report on the state of the law in 1829, remarked on the scandal brought upon the administration of justice by the efforts of the judges to discourage real actions, 'which these learned persons have thought so mischievous, that they might be usefully and properly defeated by any means,' so that in many cases the claimant failed, not from the badness of his cause, but 'from the Court taking upon itself indirectly to defeat a remedy still tolerated by the legislature.' The result was that though within the preceding hundred years many real actions had been brought, only a very small number had succeeded. So the proceeding by fine and non-claim was too uncertain to be really useful: 'Like other laws, at variance with the general feelings of mankind, it has given rise to strained decisions by courts of justice<sup>1</sup>.'

Seisin, therefore, had been deprived of much of its practical importance before the statutes of 1833-1845 were passed to amend the law of real property. The Limitation Act of 1833, the Fines and Recoveries Act, the Dower Act, the Inheritance Act, and the Wills Act, and the Acts 7 & 8 Vict. c. 76 and 8 & 9 Vict. c. 106, by abolishing the anomalies and obsolete remedies to which the Commissioners had drawn attention, and by establishing new rules as to adverse possession, dower, and descent, and as to wills and conveyances of land, deprived seisin of its theoretical as well as its practical importance in all cases except two, viz. (1) where land is conveyed by a feoffment which cannot operate as any other mode of assurance; and (2) where a man claims an estate by the curtesy.

The natural result of these piecemeal reforms was to leave open some questions which are of rare occurrence in practice and yet occasionally cause difficulty. Thus the rule that in ordinary cases a husband cannot claim curtesy of his wife's lands unless she was actually seised of them, is derived from the old rule that descent was traced from the person last seised<sup>2</sup>; consequently, when the legislature abolished the test of seisin in the case of descent, but left it still applicable to curtesy, the question arose whether on the death of a woman taking by descent under the new law of inheritance, her husband could under any circumstances claim curtesy of her lands. This question is still open<sup>3</sup>. Again, the old mode of

<sup>1</sup> First Report Real Prop. Comm. 42, 43.

<sup>2</sup> Bl. Comm. ii. 128.

<sup>3</sup> Williams, R. P., App. (D); *Eager v. Furnivall*, 17 Ch. D. 115; *Challis*, R. P. 315.

conveying land by lease and release, or by statutory release<sup>1</sup> or statutory deed<sup>2</sup>, vested the seisin of the land in the purchaser in the same way as if it had been conveyed to him by feoffment with livery of seisin, so that if land was conveyed to a woman by one of these modes, the mere conveyance gave her an actual seisin sufficient for purposes of curtesy without the necessity of her making an entry on the land. Whether this is the effect of a conveyance by deed of grant under Stat. 8 & 9 Vict. c. 106 is not clear. There is no doubt that the intention of the framers of the Act was to give to a simple deed of grant the same effect as that of a feoffment or lease and release<sup>3</sup>, and this was the interpretation put upon the Act by text-writers shortly after it was passed. Thus Mr. Shelford says: 'Livery of seisin is rendered unnecessary by this section<sup>4</sup>.' So Mr. Joshua Williams stated the effect of the Act to be that 'a simple deed of grant is now sufficient to convey the freehold or feudal seisin of all lands<sup>5</sup>.' Mr. Tudor says that if property is conveyed by grant by *A* to *B* and his heirs to the use of *C* and his heirs, 'then the seisin is conveyed from *A* to *B* and executed by the Statute [of Uses] in *C*<sup>6</sup>.' Mr. Challis also speaks of 'the abolition by the above-cited statute of the necessity for livery of seisin<sup>7</sup>' as something to be taken for granted. On the other hand, Mr. Lightwood inclines to the opinion that though a deed of grant passes 'a statutory seisin,' the grantee is not actually seised until he enters<sup>8</sup>. On principle this would appear to be the correct conclusion, for the Act does not profess to give to a grant of the immediate freehold a greater effect than it has at common law in the case of an incorporeal hereditament. Now a person entitled to a freehold estate in reversion or remainder expectant on a particular estate of freehold has not seisin in the sense of having the feudal possession of the land. When we say that a remainderman or reversioner is seised<sup>9</sup>, we mean that he has a vested estate<sup>10</sup>. So far as the feudal possession is concerned he has no seisin either in deed or in law, and even when the particular estate determines he

<sup>1</sup> Stat. 4 & 5 Vict. c. 21.<sup>2</sup> Stat. 7 & 8 Vict. c. 76.<sup>3</sup> See the note on the Act in Shelford's R. P. Statutes.<sup>4</sup> Ibid.<sup>5</sup> R. P. (third edition, 1852) 146.<sup>6</sup> L. C. on R. P. 350.<sup>7</sup> R. P. 377.<sup>8</sup> Poss. of Land, 35. The same view is taken by the editors of Goodeve on R. P. (third edition) 364.<sup>9</sup> Co. Litt. 277 a.<sup>10</sup> Watkins on Descents, 27, 109. There seems to have been at first some question whether a person entitled to a reversion or remainder expectant on an estate of freehold had a seisin sufficient to enable him to convey it by bargain and sale under the Statute of Uses (Cruise's Digest, iv. 109; Challis, Essay on Ass., 62), but it is difficult to see how the question could arise, for the statute speaks of persons being seised of reversions and remainders, using 'seised' in the sense of 'entitled to a legal estate.' The sense in which seisin is employed in the Statute of Uses is probably the reason why it has always been assumed that a deed of grant under Stat. 8 & 9 Vict. c. 106 passes a sufficient seisin to support uses taking effect under the Statute of Uses (supra, p. 242, note 3); for the grantee of an estate in possession must have at least as much 'seisin' as the grantee of an estate in remainder or reversion.

has only seisin in law<sup>1</sup>: consequently, if during the continuance of the particular estate he grants his reversion or remainder to *A*, this vests the estate in *A*, but it does not give him actual seisin; when the particular estate determines *A* has a seisin in law which he must convert into an actual seisin by entry. So if the owner of a freehold estate in possession grants it to *A* under Stat. 8 & 9 Vict. c. 106, the grant vests the estate in *A*, but it does not give him actual seisin, and if *A* is a married woman her husband will not, it seems, be entitled to curtesy, unless she obtains actual seisin by entry or by the possession of a termor.

Seisin therefore is of practical importance at the present day in those rare cases where land is conveyed by an infant under the custom of gavelkind, and where a man claims an estate by the curtesy. And if a person, in framing a legal document, chooses to use the word 'seisin' where it is not appropriate, he runs the risk of having his intentions defeated<sup>2</sup>. But apart from these exceptional cases, it is submitted that seisin, considered as a special kind of possession, is of no practical importance at the present day. In other words, if the legislature were to abolish feoffments and make the law of curtesy similar to that of dower, seisin would be as obsolete as fealty<sup>3</sup>.

<sup>1</sup> Watkins, 29, 30. As to the acts which, in the case of a reversion or remainder, were equivalent to actual seisin for the purpose of changing the root of descent under the old law, see Watkins on Descents, 110; Preston on Abstracts, ii. 441; Challis, R. P. 206.

<sup>2</sup> Leach v. Jay, 9 Ch. D. 42.

<sup>3</sup> Some points relating to the seisin of purely incorporeal hereditaments should be here noted. For purposes of descent, limitation, and recovery by real action, they practically stand on the same footing as land, except that in the case of advowsons the period of limitation is different and that rights of common, &c., are subject to special rules. The question of seisin can therefore hardly arise except in connexion with a claim to curtesy out of an incorporeal hereditament. In the case of an advowson or rent, the rule always was that if the wife died before the rent-day, or before the church became void, this did not deprive the husband of his right to curtesy (Co. Litt. 15 b).

Since the Stat. 4 & 5 Anne, c. 16, no question can arise as to the necessity of attornment for giving seisin of a seignory to a grantee.

As to advowsons, Stat. 7 Anne, c. 18, deprived the question of seisin of much of its importance, and it is difficult to see how any question can now arise except in the case of curtesy, above referred to. Before the Judicature Acts, the plaintiff in a *quare impedit* generally alleged that he was 'seised in fee' of the advowson (Steph. Pl. 42), but this was merely the traditional way of alleging his title (see *Grocers' Co. v. Archbishop of Canterbury*, 3 Wils. 221; *Robinson v. Marquis of Bristol*, 11 C. B. 208; *Carlisle v. Whaley*, L. R. 2 H. L. 407 seq.). As to the nature of the action of *quare impedit*, see Mallory, 154, 157, citing 21 Ed. IV. 1, 2; 3 Salk. 293; Booth, Real Actions, 223; *Marshall v. Bishop of Exeter*, 6 C. B., N. S., at p. 730; Common Law Proc. Act, 1862, s. 26.

With regard to rent-charges and rents-sock, the old doctrine was that seisin of a rent was necessary to enable the grantee to bring an action for its recovery. Mr. Cyprian Williams, in referring to this doctrine (L. Q. R. xi. 233, n. 6), says that it does not appear to be obsolete. *Sed quare*. Littleton and Coke treat of the seisin and disseisin of rents chiefly in connexion with the grantee's right to bring an assize (Litt. §§ 235, 236; Co. Litt. 202 b); since the abolition of real actions this question cannot, it is submitted, arise. And since the passing of the Representation of the People Act, 1884, the problems discussed in *Heetis v. Blaine* (18 C. B., N. S. 90) and

If this is so, it may be asked why the word 'seisin' frequently occurs in legal documents at the present day. It is quite usual to insert in an ordinary deed of grant a recital that the grantor is seised of the land in fee simple, and to provide in conditions of sale that where the title commences with a will no evidence of the testator's seisin shall be required. The answer is that 'seisin' is here used in the sense of ownership or title. It has already been pointed out that 'seisin' imports title as well as possession, and when we stipulate in a contract of sale that the testator's seisin shall be taken for granted, what we really mean is that it shall be assumed that he was entitled to the land in fee simple. That this is the real meaning of the stipulation is obvious when we consider that mere 'feudal possession' of land by a testator would be a most unsatisfactory root of title; he might have the feudal possession and yet be only a trustee or mortgagee, or even a mere disseisor. Some modern conveyancers appreciate this ambiguity and avoid it by requiring the purchaser to assume that the testator was 'entitled to the land in fee simple in possession.' We use 'seisin' in the same sense when we insert in a conveyance of land a recital to the effect that the grantor is seised of the land in fee simple in possession, but here the practice has some justification, for such a recital, if properly framed, amounts to a 'certain and precise averment' that the grantor has the legal estate, and thus avoids any question as to whether it operates as an estoppel against him<sup>1</sup>. The recital is however sometimes used in order to obtain the benefit of sec. 2 of the Vendor and Purchaser Act, 1874: for this purpose such a recital amounts to a statement that the grantor is absolutely entitled to the land in fee simple<sup>2</sup>. Occasionally the recital is used where the grantor has not the legal estate, but is merely entitled to the equitable fee simple<sup>3</sup>. This use of the term 'seised' by professional lawyers makes it a little difficult to understand the decision in *Leach v. Jay*<sup>4</sup>.

*Lowcock v. Broughton* (12 Q. B. D. 369) will in a short time cease to have any practical importance.

<sup>1</sup> See *Onward Building Soc. v. Smithson*, '93, 1 Ch. 1, where the authorities are referred to.

<sup>2</sup> *Bolton v. London School Board*, 7 Ch. D. 766.

<sup>3</sup> I have before me a precedent of a lease, given in a modern collection of deservedly high reputation, which contains a recital that the lessor is 'seised in fee simple in possession of the hereditaments hereinafter described, subject to a mortgage thereof in fee simple to A.' Here it is obvious that seisin has lost every vestige of its 'feudal' meaning except that of title.

<sup>4</sup> *Supra*, p. 246. Since this article was written I am glad to find the correctness of the view above put forward as to the modern meaning of 'seisin' confirmed by the following passage in the last edition of Goodeve on Real Property by Sir H. Elphinstone and Mr. J. W. Clark (third edition, 1891, p. 365), referring to the operation of conveyances at common law and under the Statute of Uses: 'The difficulty in understanding the meaning of transmutation of seisin arises from the change in meaning of the word seisin. Originally it meant the actual possession

If these conclusions are sound, there would seem to be some foundation for the contention that seisin, in the sense of feudal possession, has ceased to be the basis of our modern law of real property, and that ordinary possession has taken its place. But we are not out of the wood yet, and there are lions in the path.

In 1885, in the case of *Trustees' Agency Co. v. Short*<sup>1</sup>, a question arose which has exercised the minds of conveyancers ever since the passing of the Real Property Limitation Act of 1833. In that case the plaintiffs and their predecessors in title had owned land in New South Wales (where the R. P. L. Act of 1833 is in force) for more than thirty years, but neither they nor their predecessors had ever been in possession, and when they attempted to take possession in 1885, they found that the defendant had anticipated them. He had not been in possession for twenty years, nor could he derive title under a previous occupier, but he proved that a person named Meredith had been in wrongful possession for some years before 1853, when he abandoned the land. The defendant did not take possession until some time after Meredith's abandonment. He contended, however, that the statute began to run against the plaintiffs from the time when Meredith took possession, and that as they did not enter on the land after Meredith abandoned it, the statute continued to run, and that consequently their right was barred. (The Privy Council decided against this contention, holding that mere non-possession by the rightful owner is not sufficient: the statute does not run against him unless some other person has possession.)

The decision does not seem to have met with universal approval. Mr. Challis, in an article entitled 'The Squatter's Case,' which appeared in this REVIEW<sup>2</sup>, thought that the case might have been decided either under 'the general law of disseisin,' or under the Statute of Limitations, and that it was doubtful on which ground the Judicial Committee really decided it. 'Upon the first point,' he said, 'their lordships appear to have held that if a disseisor goes off the land without the intention of returning, this restores the seisin of the disseisee: in other words, it operates what is technically styled a remitter. . . . The proposition is by itself an ample ground to support the decision. If the plaintiff, at the time of the defendant's entry, had been remitted to his original seisin, it was quite superfluous to discuss the Statute of Limitations, which (on that hypothesis) had no more to do with this case

of a freeholder: now it means "having the legal estate, either in possession or remainder or reversion," provided that it has not been turned into a mere right of entry, as where a wrongdoer has obtained actual possession.'

<sup>1</sup> 13 App. Ca. 793.

<sup>2</sup> L. Q. R. v. 185; reprinted in Challis on Real P., App. iii.

than it has to do with any other case.' Mr. Lightwood, too, thinks that the doctrine of seisin bears on the decision. With all respect to these learned writers, it is submitted that the case does not turn in any way on the question of seisin, disseisin, or remitter. Those terms do not occur either in the arguments or in the judgment, and it is difficult to see why they should, for the action was an action of ejectment and the defence was the Statute of Limitations. Mr. Lightwood puts the case thus. The seisin of a disseisor whose title has not been perfected by the statute is analogous to the case of possession under title: consequently it continues until it is put an end to by re-entry by the disseisee: meanwhile the title of the disseisor is good save as against the disseisee, and even as against him the disseisor ranks as freeholder until the true title is restored by re-entry: in *Trustees' Agency Co. v. Short*, Meredith was probably a disseisor, and if so his seisin continued until 1885, by which time the plaintiffs' title was barred. This doctrine as to the continuance of the seisin of a disseisor is no doubt correct, but there is a difficulty in applying it to the case under discussion, because the operation of the statute does not depend on any question of seisin or disseisin. The statute was passed for the express purpose of getting rid of the doctrines of seisin, disseisin, and remitter. The operation of the statute depends on the question of wrongful possession<sup>1</sup>. And there is this fundamental difference between the seisin of a disseisor and the possession of a wrongful or adverse possessor, that the former gives the disseisor a title in fee simple by wrong which continues until put an end to by the act of the disseisee, while the latter gives the possessor a title which, until it is perfected by the statute, is only co-extensive with his actual possession; if he abandons the actual possession his title is gone. In the case under discussion, when Meredith took possession the statute began to run against the true owner, but when he abandoned possession it ceased to run, because there was no one whom the true owner could evict, or against whom he could bring an action of ejectment; there was no longer a wrongful possession on which the statute could operate. Test it in this way. When Short took possession, was he a trespasser against Meredith? Could Meredith have brought an action of ejectment or trespass against him? Clearly not<sup>2</sup>. Meredith had lost all the rights of a wrongful possessor: his inchoate title under the Statute of Limitations was destroyed by his abandonment of possession, and the title of the true owner became as absolute as if Meredith had never taken

<sup>1</sup> The difference between a disseisor and a wrongful possessor is not modern: see *Matheson & Trot's Case* (31 & 32 Eliz.), 1 Leon. 209.

<sup>2</sup> See *Brown v. Nolley*, 3 Ex. 219.



possession. This is not the doctrine of remitter. It is an application of the principle that when a man gives up a right which he has in respect of some one else's property, the relinquishment enures for the benefit of that some one else without the necessity of his doing anything. Another application of the same principle may be found in the law of easements. If *A* has a right of way over *B*'s land, and ceases to use it for such a time and under such circumstances as to show an intention of abandoning it, the right is extinguished; but it is not necessary that *B* should erect barriers across the way or do any other act to show his resumption of ownership: the mere abandonment by *A* is sufficient. So in *Trustees' Agency Co. v. Short*, Meredith's abandonment of his inchoate title was, it is submitted, as effectual to restore the title of the true owner as if he had executed a release by deed.

It does not follow that an owner of land can safely allow it to be occupied by a series of independent trespassers, and it is not to be denied that *Trustees' Agency Co. v. Short* came perilously near being within the alternative words of the 3rd section of the R. P. L. Act 1833, for not merely the dispossession of the owner by a wrongdoer, but his own discontinuance of possession, is sufficient to put the statute in operation. It is clear that if a person who is entitled to land never takes possession of it, that fact of itself does not set the statute in operation; but if he has been in occupation and gives up possession under such circumstances as to show an intention to abandon the land altogether, this, it is submitted, will extinguish his title on the expiration of the statutory period, and vest the title in any one who happens to be in possession at that time, or—failing such an occupant—in the first person who takes possession afterwards. This is the construction to which Mr. Hayes inclined<sup>1</sup>, and it is the only one which gives effect to the explicit words of the section. It was adopted in *Doe v. Bramston*<sup>2</sup>, where deliberate abandonment of land for forty years was held to extinguish the owner's title. There are no doubt more recent cases in which judges have expressed the opinion that to constitute a 'discontinuance of possession' it is not enough that the owner should be out of possession, but that some one else must be in possession adversely to him<sup>3</sup>. In these cases, however, the question arose in connexion with minerals which the owner had never taken possession of, and there can be no doubt that they were rightly decided: it is obvious that a man who buys a vein of coal does not lose his title

<sup>1</sup> *Introductio* to *Conv.* (fifth edition, 1840) 246.

<sup>2</sup> (1835) 3 *Ad. & Ell.* 63. See also the judgment of Parke B. in *Rimington v. Cannon* (1852), 12 *C. B.* 18; and that of Bramwell L.J. in *Leigh v. Jack*, 5 *Ex. D.* 264.

<sup>3</sup> *M'Donnell v. M'Kinty* (1847), 10 *Ir. L. R.* 514; *Smith v. Lloyd* (1854), 9 *Ex.* 562. In *Rains v. Buxton* (14 *Ch. D.* 537) there was actual dispossession, and consequently

to it from the mere fact that he does not begin to work it within twelve (or twenty) years; he cannot 'discontinue' possession if he never had it. These cases cannot therefore be taken as overruling the principle on which *Doe v. Bramston* was decided.

Another instance in which an attempt has been made to revive the doctrine of seisin is where the question arises as to the Statute of Limitations running against an owner in fee whose land is occupied by a lessee for years. We are told that it is not correct to speak of the lessor as being in possession by means of his tenant: 'the possession of the tenant supports the seisin of the landlord<sup>1</sup>;' *Bushby v. Dixon*<sup>2</sup> and *Doe v. Finch*<sup>3</sup> are cited in support of this proposition. The late Lord Selborne also appeared to think that *Bushby v. Dixon* had some bearing on the operation of the Statute of Limitations<sup>4</sup>. It is submitted that this is not so. The question whether the statute has begun to run against a lessor has nothing to do with seisin; it depends on whether the case falls within one of the rules laid down by the Act, which, as Mr. Hayes remarked, 'break in materially upon the principle of the old law<sup>5</sup>.' Moreover, *Bushby v. Dixon* and *Doe v. Finch* are both obsolete authorities, for the question in the former was what kind of seisin was sufficient within the rule *seisina facit stipitem*, and in the latter, what kind of seisin would support a fine.

To sum up. The history of our law of real property, from the invention of uses down to the year 1845, consists largely of a series of successful attacks on the obscure and inconvenient doctrine of seisin. If the legislature had been consistent, and had abolished feoffments and made the law of curtesy similar to that of dower, seisin would be completely obsolete. As matters stand, the doctrine still exists for those two purposes, but for all others it is obsolete in everything but name. Seisin is no doubt an interesting subject of historical study, but to treat it as having a practical bearing on the modern law of adverse possession is to keep

With phantoms an unprofitable strife,

and to add unnecessary difficulties to a subject which has sufficient difficulties of its own.

CHARLES SWEET.

the question of discontinuance of possession did not really arise. Since this article was in type, the editor has drawn my attention to the judgment of Kay L.J., in *Willis v. Earl Howe* ('93, 2 Ch. at pp. 553-4). In that case the question of discontinuance of possession does not seem to have been argued, and the remarks of Kay L.J. were directed to the question of continuous adverse possession. They do not appear to be quite consistent with the judgment of the Privy Council in *Solling v. Broughton* ('93, A. C. 556).

<sup>1</sup> Lightwood, *Poss. of Land*, 187. See also p. 271, where the question is discussed whether a person who wrongfully takes possession of land or holds over after his title has expired, has a seisin or 'quasi-seisin.'

<sup>2</sup> (1824) 3 B. & C. 298.

<sup>4</sup> *Lyell v. Kennedy*, 14 App. Ca. at p. 456.

<sup>3</sup> (1832) 4 B. & Ad. at p. 300.

<sup>5</sup> *Introductio* to Conv. 256.

## THE MIXED COURTS OF EGYPT.

FOR centuries past Egypt has been a favourite resort of foreigners, many of whom have settled permanently in the country.

This led to the different governments of Europe demanding and obtaining 'capitulations,' which embodied the principle, in the case of a foreigner resident here, of his entire freedom from the control of the Turkish Government.

The most important, perhaps, was a capitulation granted in 1757 to the then King of France, which has served as a model for all subsequent ones. By these capitulations foreigners resident in Egypt were to be subject only to their respective consuls, who had full civil and criminal jurisdiction over them. The maxim of international law, *Actor sequitur forum rei*, was invariably applied in these cases, but the difficulty arose that though, if the defendant was adjudged guilty, costs might be awarded and recovered against him, yet if the plaintiff was unsuccessful in his action or prosecution, the consul before whom the case was tried had no power, although he might award costs to the defendant, to make the plaintiff or prosecutor pay them.

Up to 1840 Egypt was a constituent part of the Turkish Empire, in no way differing from other provinces under the Ottoman rule. But, although Mehemet Ali was not successful in obtaining the entire independence of Egypt, he succeeded at any rate in obtaining for it virtual autonomy, subject to an annual tribute of 750,000 Turkish pounds<sup>1</sup>, with other provisions, the chief of which is that the Khedive cannot relinquish any privilege conferred upon him, or abandon any part of the territory he has acquired. He can conclude treaties with foreign powers, under the condition he does not injure thereby the political interests of the Empire.

Egypt, therefore, for judicial purposes, may be considered as quite distinct from Turkey. The many difficulties which, as the foreign population became larger, and commercial cases grew in number, the consular jurisdiction gave rise to, became a source of anxiety to the Egyptian Government, and, in consequence, the government made representations to the different foreign govern-

<sup>1</sup> 18s. 2d.

ments, pointing out the difficulties inseparable from the existing system, and asking their co-operation with the view of establishing a new one.

The Egyptian Government proposed a new judicial system on the following bases:—

(1) That the judicial administration should be entirely separated from the executive powers and should be independent of the consuls of the various powers.

(2) That there should be Mixed Courts, in which the European element would naturally enter.

The first approach was made to France by Nubar Pasha, and the French Government thereon ordered the appointment of a commission, which reported on the whole in favour of the reform desired by the Egyptian Government. This was in 1867. After this, communications were made by the Egyptian Government to the other European powers, and, after much diplomatic correspondence, conventions were made by the Egyptian Government with European Governments, and the new system was established in 1876 and has lasted till now, although it was stipulated that it should only last at first for five years<sup>1</sup>, and that after each successive quinquennial period, any power that liked might withdraw from it, and go back to the old system. No power has done so, and it may be assumed that the Mixed Courts have proved satisfactory.

The introduction of the new law was prefaced by General Rules of Judicial Organization, which are 276 in number, and deal with the whole machinery of the new Courts<sup>2</sup>. These rules have been subsequently modified, and the following sketch will, I think, be found to be a correct statement of the Courts as they exist at present.

There are three Courts of First Instance, one at Alexandria, the second at Cairo, the third at Mansourah; the whole of Egypt is embraced in these three Courts.

The Court of Alexandria consists of twelve foreign and five native judges, that of Cairo consists of nine foreign and five native judges, and that of Mansourah of four foreign and two native judges.

These judges are divided among the different nationalities as follows:—Germany has two, Austro-Hungary two, France two, Belgium two, Denmark one, Spain two, Great Britain two, Italy two, Holland one, Portugal one, Russia two, Sweden and Norway one,

<sup>1</sup> As a matter of fact for the first few years it was renewed annually.

<sup>2</sup> [The text of the 'règlement d'organisation judiciaire pour les procès-mixtes en Égypte' may be seen in Prof. Holland's 'European Concert in the Eastern Question,' Oxford, 1885.]

the United States two. Switzerland did not join the convention, and has therefore no representative in the Courts.

It seems to me that this distribution of judges does not meet actual facts.

The most numerous foreign nationalities here are Greek and Italian, after them come the French, and although there are comparatively few English permanently resident here, yet the number of tourists is annually increasing, and half the commerce of Egypt is with England. On the other hand, Germans, Austrians, Russians, and Belgians are comparatively few, although there are, I must say, many important German firms.

Each Court is presided over by an honorary native President, whose duties are nominal, although he is paid a salary. The actual President is termed the Vice-President, and one presides over each Court.

He must be a foreigner, and must be elected by an absolute majority of the members of the Court. No Englishman has ever yet filled this honourable position. It is his duty to preside over the general meetings of the Court, to divide their work among his colleagues, and to exercise a general supervision over the business of the Court and over its officials. The judges cannot be removed from their office except for grave reasons affecting their honour or independence.

No Egyptian judge can accept any distinction or honour from the Government, e.g. in Egypt the Lord Justice Brett could not have been created Baron Esher. I am not sure that the Egyptian practice in this respect is not better than the English.

In England a judge has nothing to fear, but something to hope; in Egypt he has nothing to fear or hope for from the executive.

The foreign judges are nominated by the Egyptian Government, but it will do so after obtaining from the government to which the foreign judge belongs its recommendation and acquiescence.

There is a Court of Appeal at Alexandria, consisting of thirteen judges, four of whom are native and nine foreign. In this Court, Germany, Austria-Hungary, the United States of America, Great Britain, Greece, Italy, and Russia have each one representative, while France has two. I suppose the reason for the difference is that the Code administered is based on the Code Napoléon, but the difference does not seem to be sound.

Appeal can be made to the Court of Appeal from any judgment of a Court of First Instance, if the amount in dispute exceeds 8,000 piastres tariff<sup>1</sup>, or if the amount is uncertain.

The judges are well paid in Egypt, a distinction being made

<sup>1</sup> The piastre tariff is about threepence.

between the foreign and native judges, the former receiving considerably more than the latter.

The foreign judges of the Court of Appeal receive £1600 per annum, the judges of the Courts of First Instance receive £1200 per annum; there is no pension, but to compensate for this from time to time the judges receive what is termed a gratification.

The vacation of the Courts is from July 1 to October 15 in each year. During that time the Court of Appeal does not sit. But in the Courts of First Instance one judge at least always remains to attend to urgent business.

The Courts do not sit also on Friday (the Mohammedan Sunday), on Sunday, the two Mohammedan feasts termed Bairam, Christmas Day, New Year Day, Easter Monday, Ascension Day, and All Souls' Day. From this it will be seen that the work of a judge in Egypt is not hard, for he has two holidays every week and the Long Vacation also.

A judge in Egypt who violates his professional duty, or does not abstain, whether in Court or out of it, from everything which may diminish confidence in what he does as a judge, or the respect in which the class to which he belongs is held, is subject to disciplinary measures. These are two: (a) warning, (b) penalties.

The warning may be given either in writing or by word of mouth. The penalties are: (1) The judge may be censured for what he has done. This must be a formal declaration of the fault he has committed. (2) He may be removed from his office. This can only be done after a charge has been made against him, addressed to the Vice-President of the Court to which he belongs. He must then appear, after a period of not less than five days, before the Court of Appeal, sitting with closed doors, and can only be found guilty if three-fourths of the Court find him so.

The advocates naturally form an important element in the Courts. To be inscribed on the roll of advocates a person must fulfil four conditions.

- (a) He must possess the diploma of an advocate.
- (b) He must have an untarnished reputation.
- (c) He must live in Egypt.
- (d) He must have attended at the office of an advocate or been otherwise employed in judicial matters for five years.

Advocates are only allowed actually to appear in Court after having exercised their profession in Egypt or abroad for eight years. This long period seems to be justified by the state of Egypt when the new system was introduced. There was then no provision for the teaching of the higher branches of law, and in some countries diplomas are easily obtained. But the period might now, I think,

be shortened. That a man must wait eight years before he can plead in Court, although he is duly qualified, rather shocks an English lawyer. The advocates form what is termed 'An Order of Advocates,' the head of which is termed *Bâtonnier*. From the Order is chosen an Executive Body, which is termed the Council of Advocates. The advocates, like the judges, are subject to disciplinary measures.

A mandatary is a person who is appointed by another man to represent him in legal proceedings. He need not be an advocate, and can even plead in certain cases in Court. The mandate must be a formal document, duly signed and attested. These mandataries are very numerous in Egypt. There are of course numerous officials attached to the Courts, but no mention need be made of them here; any one who knows the constitution of a French Court will know their names and duties.

Next as to the Law administered by the Courts. The law is divided into five Codes: (1) the Civil Code, (2) the Commercial Code, (3) the Maritime Code, (4) the Code of Procedure as regards the foregoing Codes, (5) the Penal Code.

It may be remarked as to these Codes that with the exception of the last, they are almost entirely a translation of the Code Napoléon, and as such do not call for much remark. But the Civil Code is prefaced by certain preliminary rules, some of which deserve notice. The new law had no retrospective effect. The actions already begun before the Consular Courts continued to be heard there until their final solution, but might, with the consent of the parties, be transferred to the new Courts. Excluded from the new Courts were all questions relating to marriage, divorce, intestate and testate succession, guardianship, and other questions relating to status.

The new Courts have jurisdiction in civil matters in all other cases between foreigners and foreigners or between natives and foreigners. In cases regarding land it was held that they have jurisdiction although plaintiff and defendant are of the same nationality, and if a mortgage exists on land the jurisdiction concerning its validity or effect belongs to them, but the Court of Appeal has lately taken the contrary view. They also have jurisdiction in all simple police cases. No change can take place in the law till after the expiration of each quinquennial period. In case the law is silent or unable to decide any matter, recourse can be had to our old friend natural law and the principles of equity, the equity of course not of *English* but of *Roman* law.

A somewhat startling clause to a student of international law is clause 14, which lays down that a foreigner can be cited before the Courts even for obligations contracted abroad.

The Criminal Code differs from the other codes in being a transcript almost throughout of the Ottoman Criminal Code. Another peculiarity of the Code is that it is only administered by the Mixed Courts to a slight extent; although the foreign Governments were willing to abandon the *Civil Jurisdiction* of their Consuls, they were unwilling to give up the *Criminal*. The result was a kind of compromise. The Mixed Courts have jurisdiction in criminal matters, but it is a very limited one. It only extends to simple police cases (contraventions), and to (1) offences committed directly against the judges and officers of the Courts while in the exercise of their functions, as force or violence or bribery; (2) offences committed directly against the execution of the judgments of the Courts; (3) crimes imputed to judges and officers of the Courts, when they have committed them in the exercise of their functions, or in abusing their functions.

It is evident that these cases are likely to be rare. The greater number of offences are still heard before the Consular Courts. But it seems to me that all criminal cases might be now transferred to the Mixed Courts, with the exception where the prosecutor and defendant are of the same nationality. The present system is incomplete. As I have pointed out previously, justice can be done if the defendant is found guilty, but if the prosecutor does not appear or the case is dismissed, although the consul of the defendant may award him costs, he has no power to compel the prosecutor to pay them. It seems that the only proceeding open to the defendant is to bring a civil action in the Mixed Courts for recovery of the sum awarded him, a proceeding both cumbrous and expensive.

Egypt has now reached such a settled condition in legal matters, that I think all criminal cases, where the complainant and defendant are of different nationalities, might with safety and advantage be handed over to the Mixed Courts, with a proviso that in the Court of Assize representatives of both the complainant and defendant should hear the case, together with a third judge of different nationality.

From the above sketch it will be seen that there is little room for an English barrister before the Mixed Courts. He could not succeed here unless he has a perfect knowledge of either French or Italian, to which he ought to add some knowledge of Arabic, for English is not allowed to be spoken in the Courts. Besides this, the procedure, which is derived from the French, is so totally unlike English procedure, that it would take a long time to master it. It would also be advisable, if an English barrister came, that he should take the degree of Doctor of Law. That degree, though of



no use to an English practising lawyer, is of great value here, as it places a man in a superior position to that of an ordinary advocate.

It will also be seen that the English occupation of Egypt has in no way interfered with the judicial and legal systems. They were here before we came, and would continue if we went away.

The only sign of the English ascendancy, so far as relates to legal matters, is the fact that Sir John Scott is the Judicial Adviser to the Egyptian Government.

His authority, however, as regards the Mixed Courts, is of a very limited kind. The Courts for each quinquennial period, within the limits laid down by the charter which created them, cannot be interfered with, and the various foreign powers, practically, as we have seen, nominate their representatives. Nor can any judge be dismissed without the gravest reasons and for good cause shown. Thus the Judicial Adviser cannot in any way interfere with the Mixed Courts, nor has he made any attempt to do so. But it is provided that at each quinquennial period the codes may be revised on the proposal of the Egyptian Government and with the consent of the foreign powers, and there is reason to believe that several important changes in the law are contemplated, to take effect on the expiration of the present period. In this case the Judicial Adviser would have great power in suggesting what improvements and amendments he deems advisable. We must not forget to mention that alongside of the Mixed Courts there are the Native Courts which have jurisdiction over all disputes between natives. The native codes are essentially similar to the codes of the Mixed Courts.

The nomination of persons to the position of judges in these Courts is entirely in the hands of the Egyptian Government, which sometimes appoints foreigners. In the nomination of judges for the Native Courts, the Judicial Adviser has great weight. On their first creation in 1883 the native judges were not a success. But I am informed from various quarters that a great improvement has of late years been effected in the character and work of the native judges, great care having been taken by the Egyptian Government and the Judicial Adviser to nominate able and learned men, who have shown great activity and zeal in their duties. The question thus arises, would it not be desirable after a comparatively short period for the foreign governments to consent to the abolition of the Mixed Courts, so that all *civil* cases, at any rate, might be heard in the Native Courts? The existence of the Mixed Courts in Egypt is a serious blow to the autonomy of the Egyptian Government, which in theory at least is independent so far as regards its executive power.

The maxim 'No State can administer justice beyond its territory' is complemented by the maxim, Each State has the right and the *sole* right to administer justice *within* its territory.

The abolition of the Consular jurisdiction in civil matters has proved a success. I see no reason why, say after a period of ten years, the Mixed Courts should not also be abolished, and the Native Courts alone exist. As I have pointed out, the law administered by these two Courts is substantially the same, and thus the transition from one system to another would be easy.

Egypt has long been under tutors and governors in judicial and legal matters as well as in others, cannot she be trusted before long to walk alone?

W. E. GRIGSBY.

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## COLLISIONS AT SEA IN RELATION TO INTERNATIONAL MARITIME LAW.

### A NECESSARY REFORM IN THE LAW OF COLLISION<sup>1</sup>.

#### I. *The Law of Collision where both to blame.*

Division  
of loss.

**I**N the event of a collision between two ships through unskilfulness and negligence on both sides, the damage is, by the law of England, divided equally between the two vessels, however much the degree of fault may differ. Such was the law of the United States, but seems no longer to be so, as will be shown hereafter.

The loss  
lying  
where it  
falls.  
General  
average.  
Proportional  
rule.

The Dutch, German, Italian, and some other marine codes leave the loss where it falls, giving neither ship a right to recover.

Turkey and Egypt divide the damage according to the respective values of the vessels as a kind of general average.

In France, Norway, Sweden and Denmark, and in Belgium, Greece, Portugal, and Roumania, the judge apportions the blame between the two vessels and divides the total damage accordingly: if there is no difference in the degree of negligence, the loss is equally divided, or allowed to lie where it falls; if there is a difference the more guilty bears the greater part of the loss; the greater the blame the greater the damages.

On May 28, 1895, this same system was affirmed by the Court of Appeal (4th Circ.) of the United States in a remarkable opinion delivered by Judge Simonton. Finding one vessel grossly in fault and the other guilty only of an act of omission, the Court held that it would be manifestly inequitable to fix the latter with one-half of the entire loss, and decided to have the liability of each vessel measured by the degree of fault.

There are thus four systems:—

1. Division of loss.
2. Leaving the loss where it falls.
3. General average contribution.
4. Proportional rule.

That of leaving the loss where it falls cannot be justified except where the faults are equal, and they are not always equal. There-

<sup>1</sup> S'il m'a été possible de présenter en anglais les quelques idées qui vont suivre, je le dois à la bienveillante collaboration de M. Leslie Scott, de Liverpool, qui a bien voulu revoir mon manuscrit. Je tiens à lui en exprimer ma vive reconnaissance, en laissant aux lecteurs le soin d'apprécier la compétence et la sagacité de son intervention.—L. F.

fore the system is false. But I do not think there is much chance of its restoration to favour in England, and I need not deal with it further.

The Egyptian system is nothing more than a curiosity—worthy of a country where curiosities abound. In this system, the greater the value of your ship, the greater the damages it must pay: to own first-class ships will merely be to increase your liability. But it is needless seriously to combat this strange fancy.

It remains then simply to compare the rule of division of loss with the proportional rule.

My opinion is that the last system is the only one consistent with justice and equity.

But expediency may be opposed to justice, and I therefore propose, upon the suggestions made to me by my honoured friends Mr. Thos. R. Miller of London, and Mr. Gray Hill of Liverpool, both members of the International Law Association, to show, from my experience at the continental bar, that the rule of apportioning the loss is not only theoretically right, but in practice works easily, effectively, and correctly, to the satisfaction of all concerned.

## 2. *The theoretical value of the reform.*

Suppose a collision to have just taken place in the Channel between an English steamer and a foreign steamer, and that the damage is £3,000 to the English and £1,000 to the foreign vessel. The foreign vessel, having the English on her starboard side, rashly kept on her course, and, without materially altering either her helm or her speed, ran down the English vessel. Those in charge of the English vessel slackened speed and stopped and reversed, but were too late in performing that necessary manœuvre.

You, sir, are the interested owner of the British ship. You take the best advice you can obtain, and ascertain the following particulars:

1. The foreign vessel belongs to a Dutch company.
2. She is moored at Dover.
3. You are entitled to arrest any other steamer and freight belonging to the same owners, which may be at Le Havre or at Antwerp, or any other French or Belgian port<sup>1</sup>.

Here, the contrast between the three systems of dealing with damage where both are to blame becomes apparent. Each of the three above-mentioned facts gives jurisdiction to a different Court,

<sup>1</sup> By arresting a steamer and freight belonging to the same owners you can bring the question of the collision within the cognizance of Belgian and, in my opinion, of French Courts especially if any of the cargo is French owned.

and each Court will decide the case upon a different principle: and it is for you to make your choice. At Rotterdam you will obtain nothing. In London you will obtain, under the rule which divides the loss equally, £1,000<sup>1</sup>. At Antwerp or Le Havre with the proportional law you will recover £2,200, the blame being apportioned as one-fifth to four-fifths<sup>2</sup>. Which do you consider the best rule?

The Dutch costs you £3,000.

The English costs you £2,000.

The Belgian or French costs you £800.

The above figures speak for themselves, and the logical conclusion to be drawn from them is obvious.

Where negligence, or *culpa*, constitutes the cause of action, it stands to reason that liability ought to be measured by the degree of negligence of which the two parties are respectively guilty. In the case supposed your negligence has been slight, and therefore it is only fair that your liability should be small. In fact the case of the owners is analogous to that of the captains. The captain of the foreign ship has been guilty of gross misconduct, your captain of an error of judgment—he was not quite as prompt as he might have been; your captain deserves a reprimand, the other captain dismissal. So, regarding the damage as the penalty for negligence imposed by the Court, it is right that the penalty paid by you should be light, by the foreign owners should be heavy. In other words, the proportional rule is the fair rule.

My experience is that in collision cases the fault is very often more on the one side than the other; but even if such difference of guilt happened but once in twenty cases, the most elementary sense of justice would demand a difference in the treatment of the two parties. This the Courts of Norway, France, Belgium, &c., and now also the Courts of the United States can do, but the English judge cannot. If a pair of scales is the emblem of maritime justice in England they are strange scales, in which the slightest neglect—*minima culpa*—less even than that, a statutory presumption of fault—weighs as many pounds sterling as the grossest misconduct.

The English rule is then unjust. But it is also illogical. It is intelligible that the law should take away all right of recovery when there is common fault; but it is impossible to understand why a law which recognizes the principle of dividing the liability should decide that in every case the division should be by halves. That is purely arbitrary. Either the principle of division is just,

$$1 \quad \frac{3000}{2} - \frac{1000}{2} = \frac{4000}{4} = 1000.$$

$$2 \quad \text{That is } \frac{4}{5} \text{ of } (3000 + 1000) - 1000 = \frac{4 \times 4000}{5} - 1000 = 3200 - 1000 = 2200.$$

and then it should be complete, that is proportional ; or it is unjust, and there should be no division—by halves any more than by quarters.

But not only is the rule unfair and illogical, it is also born of a historical mistake. The practice had its origin in a mediaeval rule, which applied to cases of inscrutable negligence, and not at all to cases where the faults are ascertainable.

The only real objection made to the proportional rule has been this : It is theoretically right, but does it work well ? Is it possible to ascertain the degree of fault ? Will it not increase litigation ? Let the facts answer these doubts.

### 3. *The Practical Value of the Proportional Rule.*

The law of proportional division of loss rules a tonnage of 3,550,000 tons, and, including the United States, 5,715,000 tons. It is daily applied by minds as different as those of a Frenchman, a Norwegian, a Greek, and a Belgian ; and yet no complaint is ever heard that it works unjustly.

I think it may be useful here to add to my own views the opinions of some eminent men in the various countries where the proportional rule is in force. They are : Monsieur de Valroger, ex-president of the Conseil de l'Ordre des Avocats at the Cour de Cassation in France, author of an excellent treatise on maritime law ; M. Clunet, editor of the *Journal de Droit International Privé* ; M. F. C. Autran, editor of the *Revue Internationale du Droit Maritime* ; M. O. Platon, professor of Maritime Law at the University of Christiania ; M. Marais, Bâtonnier de l'Ordre des Avocats at the Rouen Court of Appeal ; M. Edmond Picard, senator and advocate at the Belgian Cour de Cassation, and chief editor of the *Pandectes Belges* ; M. R. S. Gram, Judge at Copenhagen ; M. Uppstrom, Judge at Christiania ; M. Lagersholm, president of the Swedish Marine Insurance Company. Their answers are, with one hesitating exception, unanimous. The reader will find them at the end of this article.

As far as Belgium is concerned I may say, that not only in my own personal experience, but also in that of my colleagues, before the Antwerp and Brussels Courts, this rule is daily applied without difficulty.

In any discussion upon the working of the rule, two points must be borne in mind. Exactly the same investigation into the circumstances of a case must be made under the proportional rule as in England—neither more nor less. The facts, the responsibility and the damages must be ascertained under both rules. It is only

The working of the Rule.

at this point, where the task of the English judge is ended, that the divergence begins: the French or Belgian judge goes on to decide whether there is a difference in the degree of negligence upon the two parties.

No compulsory apportionment.

No obligation whatever lies upon the French or Belgian judge to find such a difference in the degree of negligence of the two ships, if no such difference exists. If he cannot distinguish between them to his own satisfaction he will divide the damage equally, or if the loss incurred by each interest is proportionally about the same, he will leave the loss where it falls and dismiss both claims. Where equal division of loss fairly meets the facts of the case he applies the English rule, just as he applies the German rule, and admits no claim, where the justice of the case is best so met. But where the Court finds both a rational and a moral difference in the amount of culpability, it is entitled to give effect to that conviction.

No nice calculation.

The system, then, is not an attempt to convert a collision case into a mathematical problem, where every act shall be given its numerical value and the total number of marks obtained by each side added up and compared at the end. It is a question not of algebra, but of common sense.

For instance, one ship is guilty of gross misconduct, the other of a failure to comply with the regulations, which under the circumstances was almost excusable; the former will bear four-fifths of the total damage, and the latter one-fifth. If the difference is less the proportion will be three-fourths to one-fourth. Or if smaller still, the proportion will be two-thirds to one-third. I have never heard of any extraordinary difficulty being felt in the apportionment of the blame in this way. On the other hand I have often been told by judges that it is much easier to make such a comparison than to decide what was the operative cause of the collision, with a view to fixing one ship with the whole responsibility and holding the other blameless.

There is another point of view from which, I think, the difficulty of thus apportioning the blame may seem less. In applying this principle, the Court acts in collision cases exactly as in penal matters, where it fixes the penalty at some point between the maximum and minimum allowed by law, to suit the gravity of the offence.

As mentioned above, the usual fractions are thirds, fourths or fifths. This is also the case in France, in Norway, and in Denmark. The judge does not attempt finer distinctions, unless there are three or four ships concerned; in such a case it may happen, for instance, that one-half of the loss being thrown upon one vessel, all the others

divide the remaining half amongst them, and if, for instance, there are four equally to blame, they will bear one-eighth each. But the general fractions are thirds and fourths. Naturally it may in some cases be difficult to know whether the blame should be measured by one-fourth or one-fifth—it is a matter of appreciation just as in many cases the amount of damages is. But in a large number of collision cases the parts generally played by the respective vessels in the nautical drama make the apportionment of blame very easy.

For instance, by her sole negligence, *A* turns a position of security into one of danger. The danger having been created, *A* either continues in her fault or makes matters still worse by committing another; but *B*, on her side, does not do *all* she might, in order to avoid the final collision. In such a case the creation of the direct danger by *A* will be considered, generally, as a reason for putting a heavier burden of damages upon her owners—it may be two-thirds or three-fourths; and I think this is an accurate and fair estimate of the case.

Or again, one vessel transgresses a rule of the road, and also the rule of slackening speed, and stopping and reversing; whilst the other vessel, which may perhaps have expected to escape by keeping on her course, only transgresses the latter rule. The former vessel is without any doubt the more to blame.

Instances from the experience of myself or others will still better show the actual working of the rule.

Practical  
instances  
of the Pro-  
portional  
Principle.

#### LIGHTS.

##### *Flare-up.*

The *Oliva* and *Severin* were navigating at night, at the same speed, in the Scheldt, bound for Antwerp, the former steamer being about 250 yds. ahead. Near the shore-lights of the *Rilland* the *Oliva* slackened and starboarded, without showing a flare-up to the overtaking *Severin*. A collision occurred.

Held, that both were to blame, the *Oliva* for not giving by light or whistle any signal that she was slackening her speed, the *Severin* for not using proper care, as her captain ought to have known that at night it was almost necessary to slacken in the neighbourhood of the *Rilland*. As both vessels seemed equally in the wrong, the damage was divided<sup>1</sup>.

<sup>1</sup> Antwerp Commercial Court, May 13, 1890. *Jurispr. du Port d'Anvers* 1891, p. 192.



*Improper Lights.*

By article 2 of the Regulations no other than the regulation light shall be carried.

On a dark night a Norwegian brig was run down by a steamer. The brig carried an extraordinarily bright light in her cabin, which was visible at a considerable distance and may have misled the steamer; but the steamer by the exercise of more skill and nerve subsequently might have avoided the collision.

Held, that the brig must pay a part of the damages, but only a very small part, on the ground that the infringement of the regulations was not serious.

## RULES OF THE ROAD.

*Crossing Ships.*

The *Sirius* and the *Durley* were crossing steamships. The *Durley* having the *Sirius* on her starboard side did not alter her helm. But the *Sirius* failed to reverse her engines, and at the last moment altered her helm.

Held, that the *Durley* committed the initial and more serious fault, and must answer for four-fifths of the damage<sup>1</sup>.

*Duty to hold on.*

Those who are acquainted with these matters know, that where one of two ships is to keep out of the way, the duty imposed on the other to keep her course is, in some cases, really difficult to perform. In such cases the proportional rule is welcome to an equitable judge.

A fishing-smack, the *Cornélie*, holding on before an approaching steamer, showed some hesitation in keeping her course. But the steamship, which could by an easy manœuvre have avoided the collision, did nothing at all, failing to slacken speed till the last moment; and the smack foundered.

The Court of Appeal was of opinion that there was fault on both sides, but that there was no comparison between the reckless navigation of the steamer and the imperfect compliance with the regulations by the fisherman. Four-fifths of the damage were borne by the steamer<sup>2</sup>.

<sup>1</sup> Cour de Bordeaux, July 30, 1888. *Revue Int. Droit Mar.* IV. p. 260.

<sup>2</sup> Court of Appeal at Brussels, July 6, 1876. *Pasicrisie Belge* 1877, p. 118.

*Starboard side Rule in a Narrow Channel.*

A lighter was driving on with the tide at the entrance of Antwerp harbour just at the very moment when steamers were being docked out. A steamer, instead of waiting till the lighter had passed and left more room, went on, and failed to take as closely as possible the starboard side of the channel. A collision occurred.

The lighter was blamed for navigating in a way which at that moment was dangerous, and the captain of the steamer for navigating in mid-channel.

The damage was apportioned by fifths, three-fifths to the lighter, and two-fifths to the steamer. But as the imprudent navigation of the lighter had been noticed by those on the bridge of the steamer, who nevertheless went on, the owners of the steamer, in order to avoid an appeal, agreed to pay three-fifths of the loss; and the matter was settled<sup>1</sup>.

*Starboard side Rule and Anchored Vessels.*

A tug towing three lighters came at night out of the New Docks gate at Antwerp, and took her course in mid-channel. Near the second dockgate the *Strathlyon*, although seeing the tow, came stern first out of the gate, and compelled the tug to port; but soon after porting, the presence of an anchored steamer, the *Saga*, obliged her to starboard. The tow being too long it was impossible for the tug to carry out successfully the complicated course rendered necessary by the manœuvre of the *Strathlyon*, and the last of the lighters collided with the *Saga* and sank.

On the approach of the tow those in charge of the *Saga* did nothing to leave more room. All were clearly to blame, and the proportional rule was a nice method of dividing the liability.

Tug and tow were held in default for their course in mid-channel and for their length. They had to bear six-eighths of the damage; the tug, which, as having the directory power was the more responsible, bore three-eighths, the two uninjured lighters two-eighths, the plaintiff, the sunken lighter one-eighth. The *Saga* and the *Strathlyon* were each held liable for one-eighth, the former for not having slipped her anchor, the latter for coming too hastily out of dock.

The mental operation of the judges was clearly this; the larger part of the blame was on the tug and tow, but blame also attached to the *Saga* and the *Strathlyon*. As between the tug and the tow the more guilty was the tug. Then they sought figures to express

<sup>1</sup> Commercial Court of Antwerp, March 6, 1891.

their opinions. I acted in the case, and may state that the division they made was not seriously criticized.

*Rule to slacken speed, stop and reverse.*

It may be a nice question to determine exactly when it becomes the bounden duty of the officer in charge to slacken speed or stop and reverse.

The steamer *Baron Osy* was recklessly holding the wrong side of a narrow channel. The *Archimedes*, on the opposite course, was thus in conformity with the regulations on the same side. Noticing that the *Baron Osy* continued in her wrong course, the *Archimedes* stopped.

Held, that she ought to have stopped sooner, on observing the abnormal course of the *Baron Osy*. Nevertheless her owners were only charged with one-fourth of the liability, 'As the blame on her was small in comparison with that of the *Baron Osy*, and as the collision would not have occurred unless the contributory faults of the *Baron Osy* had been first committed.' Such are the terms of the decision<sup>1</sup>.

*Improper Anchorage.*

In the following case (unreported), which I pleaded, the proportional rule was correctly applied to negligence of ships at anchor. Two steamships were at anchor at the mouth of the Scheldt. At night, after the turning of the tide, the anchor of *A* gave way, and drifting with the tide, she came into collision with *B*. Both could have avoided the collision if their watches had been better. But it was equitably decided that the drifting steamer, although not exactly a vessel under way, was the less excusable for not having noticed the fact that she was moving. The total loss was divided by apportioning two-thirds to *A*, and one-third to *B*.

*Improper Navigation and Anchorage.*

The *Kelly* was preceding the *Eliza Anna* at about 700 yds. distance. The *Kelly* before heading the tide, and without giving any notice of her manœuvre to the *Eliza Anna*, came to an anchor. A collision occurred through the *Kelly* swinging to the tide across the bows of the *Eliza Anna*, who on her side failed to change her helm.

Held, that the *Kelly* was answerable for two-thirds on the ground that her anchoring was dangerous, and that her manœuvre could

<sup>1</sup> Commercial Court of Antwerp, May 12, 1882. Jurisp. du Port d'Anvers 1882, p. 197.

not have been observed by the *Eliza Anna* until a moment just before the collision, but that the *Eliza Anna* contributed to the collision by failing to take immediate measures to avoid it<sup>1</sup>.

*Tow and Tug. Sheering about.*

The *Progrès*, a lighter, was anchored at night at the confluence of the Scheldt and the Rupel, about ten miles from Antwerp. Although the anchorage was illegal and dangerous and no watch was kept, there was room to pass on her right side. A tug, the *Telephoon*, having a long tow of lighters, nevertheless took the narrow and dangerous way on the left side. At the same moment the improperly anchored *Progrès* sheered about, and one of the towed lighters came into collision with the *Telephoon* and was lost.

For the owners of the sunken cargo, I with M. Jules Vraucken obtained a judgment (unreported) saying that all were to blame; the *Progrès* for unsafe anchorage and absence of look-out; the tug for taking without any reason the more dangerous course on the left side of the *Progrès*; the lighter, finally, for not having slipped the tow-rope on seeing the peril. As the Antwerp Court were of opinion that the *Progrès* and the tug *Telephoon* were equally in the wrong and the lighterman less, a proportion was sought which would give expression to that opinion. The loss was accordingly divided by fifths. One-fifth to the lighterman, two-fifths each to the *Telephoon* and the *Progrès*; the cargo-owners obtaining judgment for the whole of their loss.

A perusal of the above instances in which the proportional rule has been applied will, I think, be sufficient to satisfy the British public that the system works without difficulty, and is easily understood. The learned judges of the Admiralty Division of the High Court are, in my opinion, the most experienced maritime judges of Europe. There is no reason why they should not be able to do what is done by their colleagues in France, Belgium, Norway and Greece.

In every case where they find in both ships equal negligence and equal responsibility for the accident, the judges will continue the apportionment by halves, which is division of loss. In fact, division of loss is a rough and ready proportional rule, and the only change necessary is to make it more perfect; to have a flexible rule which may be adapted with more accuracy and justice to the various circumstances of each case.

Expe-  
rience of  
British  
Judges.

When  
division of  
loss will  
continue.

<sup>1</sup> Dec. 1, 1886. *Revue Int. Droit Mar.* II. p. 531.

Incorrect  
apportion-  
ment of  
the blame.

There may be occasions when the blame is not correctly apportioned—perfection is not of this world. I have met with such cases, and my experience is this. Even an approximate proportion is more welcome to the parties than a mere division of loss which is no approximation at all. The suggestion of blame at all is generally repelled with energy, but, when once blame is admitted or proved, the proportion fixed by the judges does not give rise to much criticism. The ship which was actually responsible for a quarter of the total damage is clearly better off if it have to bear, say, one-third of the damage than by the rule of division of loss. Where the Court says one-third where it should have been one-fourth, it is a mistake of the Court:—and even the best judge is not beyond the reach of error. But where the judge, although seeing and saying that the faults are not at all equal, is nevertheless compelled to make the burden of damages equal, justice fails.

And justice fails still more when the judge, although seeing negligence which ought not to remain unblamed, cannot or will not keep it in sight because he cannot bring himself to punish a trifling fault with liability for half the total loss. Surely the proportional rule which avoids extremes is the fair one.

Appeals.

On the question of the effects which the proportional rule has upon the frequency of appeals, no unfavourable evidence is forthcoming, either in Belgium, or in any other country where the proportional rule applies. There is no reason to think that the law of apportioning the damage to the fault gives rise to more litigation or appeals on the continent than the rule of division of loss in Great Britain. On the contrary more than one case has been, to my own knowledge, settled after the first trial, simply because it has not been thought worth while to incur the costs and delay of an appeal on a mere fraction of the damages. But where the question at issue is whether a half, or the whole of the damages, or nothing shall be paid, then there is a great temptation to appeal. At any rate, so long as an appeal is allowed by law, it is not possible to regard it as so great an evil that it is worth while having a bad law in order to avoid it.

Authori-  
ties for  
the pro-  
portional  
rule.

Just as on general principles the proportional rule is just, so I think it may now be stated that there is no serious objection of a practical kind to it.

Why then should there continue in force in England a practice which Chief Justice Denman once described as 'an arbitrary provision of the law of nations not dictated by natural justice nor, possibly, quite consistent with it'?

It is solely by the force of custom and tradition that the system has survived. It is the old story told by Bynkershoek.

When that greatest of eminent jurists of last century proposed to his colleagues of the Supreme Court in Holland that they should apportion according to the respective faults the losses caused by a collision where both ships were to blame, the story runs that those learned but tradition-tied men were thunder-struck and unable to bring their minds to entertain the proposal of their chairman. That old traditional thunder still seems to affect the minds of men as it did in that day.

But many also have freed themselves from the fear of it!

On the continent the proportional rule has been adopted by the following important international meetings, though there were some dissentients in favour of the British system :—

Continental  
Meetings.

In 1885, the Commercial Congress of Antwerp.

In 1888, the Commercial Congress of Brussels.

In 1888, the Meeting of the Institut de Droit International at Lausanne.

In 1892, the Commercial Congress at Genoa.

But meetings, which have been mainly British, have also voted in favour of the rule : such as—

British  
Meetings.

In 1895, the Brussels Conference of the International Law Association.

In 1896, the Chamber of Shipping of the United Kingdom, in London.

Support has been given to the movement by men whose experience entitles their opinion to great respect, such as the representatives of—

Opinion of  
British  
under-  
writers  
and  
owners.

The Liverpool and London Steamship Protection Associations.

The West of England Steamship Owners' Protection and Indemnity Association.

The American Chamber of Commerce of Liverpool.

The Newcastle Protection and Indemnity Association.

The London Steamship Owners' Mutual Insurance Association.

A principle is not established by the number of its adherents ; but a presumption is raised in favour of the advocated reform when its adherents are so many and so various. The numerous letters of eminent men printed at the end of this article form a body of authority which is a further, and a very strong argument in favour of the proportional rule.

To these authorities may be added the most important fact that the proportional rule has recently found its way into the law of the United States.

United  
States.

Where two steamships, the *Fictory* and the *Plymothian*, met each other on a bright afternoon in a broad and deep stream with ample sea room for each vessel, and both were on the same side of the

channel, it was held that both were to blame; the *Victory* for keeping obstinately to the left or wrong side, the *Plymothian* for not taking proper precautions in order to avoid collision, when it became plain to those on board her that the starboard side rule was being disregarded by the other vessel.

But the Court held that the *Victory* was grossly in fault, that her course seemed almost wilful, that she was without any doubt the chief cause of the disaster, and under these circumstances held that it would be manifestly inequitable to divide the loss equally. The owners of cargo on the *Plymothian* intervened.

'The rule of division,' said Judge Simonton, 'cannot be said to be inflexible. In the *Max Morris*<sup>1</sup>, the question was suggested before the Supreme Court, but it was not necessary to pass upon it. The Court says: "Whether in a case like this (mutual fault) the decree should be exactly for one-half of the damages sustained, or might, in the discretion of the Court, be for a greater or less proportion of such damages, is a question not presented for our determination on this record, and we express no opinion upon it."'

'The application of an equal division of damages,' continues M. Simonton, 'is said to be *rusticum judicium*. . . . That is to say, it is an application of that sense of fair dealing and of justice embedded in our nature, the conclusions of common sense, of a mind *abnormis sapiens*. If the spirit of the rule be adopted, and the liability of each vessel be measured by its degree of fault, exact justice will be done by applying the stipulated value of the *Victory* (\$67,500) to the loss sustained by the cargo on the *Plymothian*, and by requiring the *Plymothian* (\$71,000) to make up any deficiency<sup>2</sup>.'

This memorable decision marks the introduction of the proportional rule in the law of the United States, and there cannot be a better conclusion to this article than the words of Judge Simonton: 'There are cases in which it would seem to be manifestly inequitable to assess equally the loss. How long will such manifest inequity remain the law of this country?'

But one word more must be said.

It ought to be the common aim of all practical men to have on maritime matters an international law to which all nations shall bind themselves by treaty.

Ships are largely cosmopolitan—made to navigate the whole world, rendering services in the same way to all nations, and whatever be their flag, fighting against the same dangers. Why then should there be differences in the laws which govern them? Why should laws change as they move from port to port?

<sup>1</sup> 137 U. S. 1. 11 Sup. Ct. 29.

<sup>2</sup> U. S. App., no. 113, p. 271. May 28, 1895. Before the Chief Justice and Goff and Simonton, Circuit Judges. 68 Fed. Rep. 395.

In regard to collision, salvage, compulsory pilotage, limitation of owner's liability, procedure and jurisdiction, negligence clauses in bills of lading, the priority of damage, and wages-*liens*, demurrage *lien*, double insurance, and so on in respect to numerous maritime matters, we live in a chaotic state of law, which allows neither owner, nor underwriter to know beforehand exactly the risks to which he subjects himself.

And who is affected to a larger extent by the many conflicts of laws than English ship-owners, whose ships are arrested in a foreign country and judged there according to different laws?

This should not be so.

As a whole, English maritime law is a plain and reasonable law. There is no doubt to me that in the process of unification of maritime law, the English principles will, to a large extent, become universal principles. But still there are some, which cannot be maintained because equity and reason condemn them.

Among these is the rule of division of loss. As a measure of compromise, which may lead to unification of maritime law, this principle ought to be changed. In doing this, the law of this country will only complete the evolution which she has already begun. When in 1873 she made generally applicable the rule of division of loss<sup>1</sup>, she showed that she abandoned the principle of leaving the loss where it falls, and was of opinion that where both were to blame the liability should be divided. To-day it remains to complete this progress by deciding that this division shall be proportional. The loss will continue as before to be divided by moieties where the faults are equal, but when they are manifestly unequal, the judge will take account of the fact in his assessment of the damages.

This example of England coming upon the recent example of the United States will so far tend towards converting to the proportional rule the countries where, till the present time, negligence on both sides has taken away all right to damages. We shall then no longer have the spectacle, so humiliating to reason, of a collision in the North Sea leading to consequences totally different according to the accidental fact of the nationality of the nearest port of refuge.

LOUIS FRANCK

(Advocate at Antwerp, Professor of Maritime Law at the  
École des Hautes Études at Brussels).

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<sup>1</sup> Judicature Act, 1873 (36 & 37 Vic. c. 66, s. 25, s.s. 9) applying the admiralty rule to actions brought at common law.



## APPENDIX.

I did not wish to limit this article to the expression of my own views, and I have accordingly addressed myself to several well-known lawyers and experienced men.

The following are the answers I have received :—

[*Translation.*]

DR. OSCAR PLATON (late Judge of the Christiania Court), Professor of Maritime Law at the University of Christiania.

TO MONSIEUR L'AVOCAT LOUIS FRANCK, Antwerp.

Norway. My late colleague in the University of Christiania, M. Fr. Hagerup, now Minister, has handed me your list of questions and asked me to answer them.

I teach Maritime Law in the University. I have besides been for many years a member of the Court of Christiania. Finally I was a member of the Commission which drew up the Maritime Code.

I think, therefore, I may say that I have had some practical experience of the law of which you speak.

The effect of Article 220 of the Maritime Law of July 20, 1893, is not new. The principle had already been introduced in § 80 of the previous law of March 24, 1860. We have therefore had in Norway an experience of more than thirty years of the proportional rule.

As you know, European maritime law has developed in different directions upon this question of making good the loss. In my opinion it is the Laws of Oleron (15) [The Black Book of Admiralty, Sir Travers Twiss, I. p. 109 ; II. pp. 229, 449 (the article is there numbered 14)], which admitted the principle of division by moieties in those cases where further information cannot be obtained. This rule then passed into various systems of maritime law, and was admitted equally with the rest by the Danish-Norwegian Code of Christian V (1683 for Denmark, 1687 for Norway), Book IV of which contained the Maritime Law.

The Norwegian Code of 1860 had the merit of breaking with this system. The text of Article 80 is as follows:

'If the collision has been brought about neither by wrongful act (*dolus*) nor by negligence, there is no occasion for indemnification, but each vessel bears its own loss.

'If faults have been committed on board both vessels, the judges must determine according to the character of the respective faults, *and according to the other circumstances*, if an indemnity is due from one party to the other, and in what proportion it is due.'

On comparing this text with that of Article 220 of the new Code, you will observe that the two texts agree, except that the words '*and according to the other circumstances*' have been omitted. It appeared that these words from some reminiscence of the old law, and especially the Laws of Oleron, gave rise to this objection that account was taken not only of the gravity of the fault, but of the value and size of the vessels and their cargoes. Our meaning was to prevent this interpretation. There was no occasion to take

account of anything but the faults committed, in such a way as to give compensation for the whole or a part of the damage.

The Swedish law of 1864, § 172, still prescribed, as a general principle, the old division by moieties, although it was permitted to the judges to divide the loss otherwise.

The Danish project of law of 1882, § 296, had adopted the same system.

There was in these two cases, therefore, an attempt at compromise between the old ideas and the new Norwegian principle.

But the Norwegian members of the Commission were unanimous not to accept this compromise, which was for them a retrograde movement. They gained the day. In consequence the new law, § 220, says :

' 1. If the captain or a member of the crew is in fault, the whole loss falls on him.

' 2. If the collision is the result of inevitable accident (*casus*),

' 3. Or if it cannot be established that a fault has been committed on board the one or the other vessel, each vessel bears its own loss.

' 4. If there is fault on both sides, the judges decide, according to the nature of the faults committed on each side, whether there is occasion, and in what measure, to make damages payable, or whether each vessel shall bear its loss.'

If Norwegians set such store by the principle of their law, it is because they had had experience of it and were satisfied.

It is remarkable that the Code of Christian V had been in force till 1861, so that four members of the Commission had known the old law in operation: they could therefore appreciate the two laws and speak from experience. I myself was still, in 1861, seated on a bench at school, and therefore had no experience of the old law. But Norwegians were strongly of opinion that they wished to preserve the principle of the law of 1860.

Therefore when you ask me whether our proportional principle works to the unanimous satisfaction of the parties interested and of lawyers, I take the liberty of answering categorically, *Yes*.

I may add that this rule does not give rise to litigation or other causes of objection. Actions are brought under the new law as under the old—but no more.

The proportional rule is, in the eyes of lawyers and clients in Norway, preferable to other systems.

Finally, I may say that the proportions in my experience are generally  $\frac{1}{2}$ ,  $\frac{1}{3}$ ,  $\frac{1}{4}$ . I have never seen cases of fractions so small as  $\frac{1}{10}$ .

The Maritime Tribunal of First Instance is composed of a judge, assisted by two men of nautical experience. In collision cases these assessors are old ship-captains. From this tribunal an appeal lies direct to the Supreme Court. Well, I may give my testimony that never, even amongst the profane, have I seen any inclination, in a case where the evidence leaves the matter in doubt, to take refuge in the *judicium rusticum*—the simple division of loss. The case is, on the contrary, estimated coolly and seriously. I remember a case where the Tribunal of First Instance had intimated that the evidence was conclusive that one vessel alone was to blame, and had condemned one of the captains to pay the whole. But the Supreme Court held that the evidence of blame was not conclusive, and each party had to bear his own loss.

Yours, &c.,

(Signed) DR. OSCAR PLATON.

## [Translation.]

M. DE VALROGER, Avocat de la Cour de Cassation in France,  
late Président de l'Ordre.

PARIS, Jan. 17, 1896.

France.  
Cour de  
Cassation.

MY DEAR SIR AND COLLEAGUE,

I hasten to thank you for your very interesting pamphlet on the conflict of laws in the matter of collisions.

In case of collision due to common negligence, justice clearly requires that the liability between the two ships should be fixed proportionately to the gravity of the fault.

But the difficulty is to weigh the responsibility of each. There are cases where the judge considers he can do it; leave, for example,  $\frac{2}{3}$  upon the one, and  $\frac{1}{3}$  only upon the other (Dall. 81. 1. 458). But very often the judge limits himself, in case of common fault, either to dividing the liability by moieties (Dall. 87. 1. 119), or to leaving each to bear his own loss (Dall. 81. 1. 458).

Beyond this, the division that may be made as between the vessels does not seem to me applicable to shippers, in regard to whom the collision is a single indivisible fact; and I think that the shippers whose goods have perished ought always to have a right to sue the captains in fault, jointly and severally (*action solidaire*) saving their remedies against each other. This is what I have pointed out in my treatise on Maritime Law (No. 2115, 2118), and this is what was decided by the Court of Bordeaux, July 30, 1888 (Rev. Inter. de Droit Marit. IV. p. 259).

Yours, &c.,

(Signed) L. DE VALROGER.

O. MARAIS, late Bâtonnier de l'Ordre des Avocats at the Court of Appeal of Rouen.

ROUEN, Feb. 19, 1896.

M. Marais writes:—

1. The rule of division of loss proportionally to the degree of the respective faults is frequently applied in our tribunals. It is in accord with the general principles of the law (art. 1382), since it measures exactly the amount of damages by the extent of the fault. It obeys also the precepts of natural justice. I never heard anybody on the question of principle criticize this rule, which I consider, for my part, to have passed into our judicial tradition to such an extent that any other rule would appear to us unjust.

2. Appeals in cases of collision have never, so to speak, as an object the criticism of the division in itself. Parties always take their stand on the ground of entire freedom from liability.

The apportionment is usually made by moieties.

## [Translation.]

F. C. AUTRAN, Avocat, Editor of the Revue Internationale de Droit Maritime.

MARSEILLES, Jan. 27, 1896.

Marseilles.

MY DEAR COLLEAGUE,

My recent absence in Paris is the cause of my delay in answering you. The French rule in cases of collision due to a common fault has *never* given

rise, so far as I know, from the point of view of principle, to any objections. This rule does not give rise to more appeals than other principles of law. It is impossible to state exactly the fractions in which the liability is allocated by the decisions, for the very reason of their diversity.

Yours, &c.,

(Signed) F. C. AUTRAN.

[Translation.]

M. EDMOND PICARD, Avocat à la Cour de Cassation in Belgium; Senator; Head Editor of the Law Encyclopaedia, 'Les Pandectes Belges.'

1. The rule of dividing the loss proportionately to the degree of the respective faults is applied in Belgium to collisions, and is so applied to the general satisfaction of both lawyers and the parties interested. It is considered a *just and reasonable rule*.

2. I have not observed that it gives rise to any cause for objection.

3. The majority of decisions adopt such fractions as  $\frac{1}{2}$ ,  $\frac{1}{3}$ ,  $\frac{1}{4}$ ,  $\frac{1}{5}$ ; seldom fractions so small as  $\frac{1}{10}$  or  $\frac{1}{20}$ .

4. This system seems to me preferable both to the Anglo-American and to the Dutch-German systems.

(Signed) EDMOND PICARD.

[Translation.]

M. JACQUES LANGLOIS, Member of the Royal Commission on the Regulations for the Prevention of Collisions in the Scheldt.

DEAR SIR,

With reference to your queries, there is no doubt, in my opinion, that the division of the liability in collision cases ought to be in proportion to the fault from which the liability arises; and that no justification for any other division can be found except in the difficulty which a judge, who finds both to blame, is supposed to have in estimating fairly the degree of fault on each side; but this difficulty is purely imaginary.

When the case is such that it is impossible or difficult to decide that one vessel is more in fault than the other, the judge must find each vessel equally liable, and condemn each one to pay an equal proportion of the damage incurred; but the fact that both vessels are found to blame should not be taken as implying that both are equally in fault, as is the practice in England.

In some countries the law is even worse, as applied to collision cases, viz. that when both vessels are adjudged to blame, each bears her own loss, whatever that may be.

In Belgium the division of the loss is made according to the estimate formed by the courts of the blame which they attribute to each vessel. This is, as a rule, by fourths, sometimes by thirds. The Belgian rule seems the most equitable, but it does not prevent the inevitable criticism of parties interested.

I am of opinion that in order to prevent unnecessary litigation on the chance of obtaining a better judgment in one country than it is possible to

obtain in another, an international agreement on the above principles of law and the apportionment of the damage is urgently required.

Yours truly,

(Signed) JACQUES LANGLOIS.

*Note.*—M. V. Uppstrom, Magistrat de la Cour de Stockholm, and M. Lagerholm, Directeur de la Société d'Assurances Maritimes Suédoise, write that the proportional rule is incorporated in their code, but is not binding upon the judge. This rule is an innovation which dates from four years ago. Up to the present time it does not seem that it has been applied in practice by the High Court. 'In my belief,' says M. Lagerholm, 'public opinion in this country still clings to the old rule (by which each bore his own loss); and as to the courts, it is well known what resistance they display when it is proposed to extend their investigations. To tell the truth, collision cases present very great difficulties for them; the most scrupulous inquiry into the faults which have caused the collision does not prevent the division of the loss from being more or less arbitrary—a thing that we detest.' Monsieur Uppstrom also thinks that the future of the proportional rule in Sweden is doubtful.

We have naturally thought it best to add these less favourable views, but the reader will notice that in Sweden the reform dates from only four years ago, and that they have had no practical experience of it.—L. F.

The Judge, R. S. GRAM, Copenhagen.

COPENHAGEN, March 16, 1896.

DEAR SIR,

*Ad* the first question in your letter of the 7th inst.:

The rule in § 220 is considered very good and just.

*Ad* the second and the third question—Fractions of apportionment and instances:

You must remember that my native country is very little, and the law not very old. Thus it may be explained that only a few cases which have bearing on the said questions are to be found in our Law Reports, viz.:

1. A judgment of our 'Højesteret' (Supreme Court of Judicature), delivered May 31, 1895. Stated that both ships had committed mistakes, and had to pay each half the *total* loss.

2. A judgment of our 'Si-oz Handelsret' (our Court of Admiralty) at Copenhagen, delivered July 3, 1895. The total loss fixed at 94,100 kroner (Danish coinage). One ship sentenced to pay 52,500 kr. of the aforesaid sum, and the other sentenced to pay 41,600 kr.

3. A judgment of the same Court, delivered August 14, 1895. Stated that the two ships had to pay each half the *total* loss.

Yours very sincerely,

R. S. GRAM.

## THE NATIONALITY OF CHILDREN OF A NATURALIZED BRITISH SUBJECT BORN ABROAD AFTER THE NATURALIZATION.

**T**HE Naturalization Act of 1870, sec. x, subs. 5, provides that 'where the father . . . has obtained a certificate of naturalization in the United Kingdom, any child of such father . . . *who during infancy has become resident with such father . . . in any part of the United Kingdom*, shall be deemed to be a naturalized British subject.'

Does the restriction conveyed in this wording apply to children born after, as well as to those born before, the naturalization?

The late Mr. Hall in his treatise on the 'Foreign powers and jurisdiction of the British Crown<sup>1</sup>,' the most recent commentary on the nationality laws known to me, says on the point in question :

'The Act is silent as to children, whether born before or after naturalization, who are not, or at least have not been, resident with the father or mother in the United Kingdom. It is to be presumed that they remain aliens. In the case of children of a father or mother residing in the United Kingdom, who have been born abroad before naturalization of the parent, this may not be unreasonable; if a father has not chosen to have his children to live with him during a sufficient part of the five years' residence which necessarily precedes British naturalization, it would in the majority of instances be fair to assume that he does not wish them to follow his change of nationality. But when children are born after naturalization, there are many probable circumstances in which an exception to this effect would be manifestly unfair.'

'It would almost seem,' he further observes, 'as if by a reaction of timidity from the anterior habit of casting too wide the net of British nationality, the framers of the Act had been not disinclined in this, as in other directions, to relieve the British Crown to as large an extent as possible from the burdensome duty of protection.'

In short, according to Mr. Hall, the restriction applies to both, and the child born after the naturalization is an alien, unless it become resident during infancy with the parent in the United Kingdom.

There is no reported decision on the subject.

The point is interesting in itself, and is a serious one for naturalized fathers who, owing to foreign connexions which make

<sup>1</sup> Oxford, 1894, p. 27.

them valuable continental agents, are employed by British houses out of this country.

The Act assumes that the naturalized alien will reside after naturalization in the United Kingdom, and under sec. 7 the applicant has to produce evidence of intention so to reside to the satisfaction of the Secretary of State. This would rather indicate that the restriction of the Act as to infant children was not meant to apply to children born after the date of the naturalization.

The question, however, would not be solved by showing that the Naturalization Act, 1870, only dealt with children born before the naturalization.

By English common law persons born in the United Kingdom alone are British subjects. It is by virtue of certain Acts of Parliament that British nationality is extended to children and grandchildren of natural-born British subjects.

4 Geo. II, c. 21 enacts that 'children . . . born out of the ligeance . . . of the Crown of England . . . whose fathers shall be natural-born subjects of the Crown of England at the time of the birth of such children respectively, shall be . . . taken to be . . . natural-born subjects of . . . Great Britain,' &c.

Are the children of naturalized British subjects in the position of those 'whose fathers shall be natural-born subjects of the Crown of England'?

An alien to whom a certificate of naturalization is granted is entitled to all political and other rights, powers and privileges, and is subject to all obligations 'to which a natural-born British subject is entitled or subject'<sup>1</sup>.

There are only two qualifications to this assimilation, viz. that when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, he is not to be deemed a British subject, and that nothing in the Act qualifies him to be the owner of a British ship.

Otherwise, then, a naturalized British subject is assimilated entirely to a British subject, for he cannot as such be invested with more than *all* the political and other rights, powers, privileges, and obligations of a natural-born British subject.

Is the benefit derived from the Act of 4 Geo. II, c. 21 the right of a natural-born British subject? It is certain that it rests with

<sup>1</sup> An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect. Naturalization Act, 1870, sec. vii, suba. 3.

the parents and not with the child to determine where it shall be born, and that the possession of that discretion is a right; but on the other hand there is the decision in *Fitch v. Weber* (6 Hare 51), according to which the privileges which this statute confers are privileges of the child.

It is surely desirable, in order to prevent hardship and disappointment to those concerned, that the Home Office warn naturalized British subjects that their children, unless born on British soil, will be British subjects only in the event of their becoming resident in Great Britain during infancy with the naturalized parent, and explain what term of residence is considered sufficient.

THOMAS BARCLAY.

[As to the operation of the earlier Acts, cp. *De Geer v. Stone*, (1882) 22 Ch. D. 243.—ED.]

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## REVIEWS AND NOTICES.

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[Short notices do not necessarily exclude fuller review hereafter.]

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*Tribal Law in the Punjab, so far as it relates to right in ancestral land.*

By CHARLES ARTHUR ROE, Senior Judge of the Chief Court of the Punjab, and H. A. B. RATTIGAN. Lahore : Civil and Military Gazette Press. 1895. La. 8vo. x and 150 pp.

INTIMATE friends of the learned judge, to whom we owe this valuable and interesting contribution to the evidence illustrating the primæval origin of our land laws, and those probably of all nations of Indo-European origin, are aware that the leisure hours of many years have been spent in collecting the materials out of which it has been put together. He has been ably assisted by Mr. Rattigan, a son of Sir William Rattigan; but the learned judge is constituted the mouthpiece, and the book is written in the first person. He refers in the preface, in terms of high appreciation, to the uncompleted work of Mr. C. L. Tupper, of the Indian Civil Service, upon Customary Law; and the bearing of this subject upon the historical questions to which we have referred will appear from a passage in Chapter I, in which Mr. Roe prefers the conclusions of Mr. Tupper to those of Sir Henry Maine. 'In his note,' he says, 'on the Settlement Report of the Dera Gházi Khán District, Mr. Tupper has explained the various ways in which property in land has there originated. He shows that, whilst no doubt in many instances individuals have acquired their rights by settling on and reclaiming waste lands by their own exertions, the chief origin of titles has been tribal distribution. In the first chapter of the second volume of his work on Customary Law, Mr. Tupper deals with the subject at greater length and in a more general manner, criticizing Sir Henry Maine's theory that the order of development has been the Family, the House, the Tribe; he expresses the most decided opinion that the order should be reversed, and that, at least as regards proprietary right, it has been the Tribe, the House, the Family. I will not attempt to express any opinion except as regards the Punjab, and here I have no doubt whatever that Mr. Tupper is right.' And as the gradual differentiation of septs and tribes leads to variety in their several applications of a custom which may in its origin have been uniform, so we arrive at those different customs which are embodied in the Riwáj-i-ams, or records of tribal customs, prepared by the Settlement officers during the progress of the settlement of the district, which serve a kind of double purpose, partly that of a Domesday Book and partly that of a collection of institutes of the law. Very interesting is it to note the influence of the decisions of European judges, in modifying harsh or otherwise objectionable features, harmonizing differences, and filling up gaps and *lacunæ*. Chapters II and III of the work, which contain an examination in detail of the evidence afforded by these records of the customs, and by the decided cases in the Courts, of the development of various points of tribal

law, are of a highly practical character, and are intended specially for the assistance of the Courts and legal practitioners in the Punjab. And though the details of this investigation are too technical to be interesting to English lawyers, yet the general conclusions set forth in Chapter I should be of high interest to all Englishmen. There we find a general sketch of the Punjab and its tribes; their origin (pars. 1-9); references to and criticisms of Sir Henry Maine's opinion as to the general order of social organization, which has above been briefly adverted to; a description of village communities and their organization (pars. 10-12); a view of the inapplicability of Muhammadan law to these (pars. 13-15); an account of the contrast between the primitive and the modern state (par. 16); an inquiry into the origin and nature of customary law generally, of which the conclusions differ rather widely from those of Sir Henry Maine (pars. 19-21). The view of the learned authors is, that the fundamental principles of the Punjab Tribal Law are to be found in strict succession among the *agnati*, and the consequent restrictions upon the powers of the owner of the estate for the time being (pars. 22-24). The next ten paragraphs deal with the principal points on which these restrictions operate. They are followed by further discussion of general principles and the causes which have influenced the growth of customary law, both in the Punjab and in other countries, for example, the effect of marriage customs, and of the interference and control exercised by the British Courts and officials. It is not possible within the limits open to us to discuss the work further; and we can only commend it, and particularly Chapter I, to the perusal of our readers.

H. W. CHALLIS.

*Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen.*  
 Von Dr. PAUL HEILBORN. Berlin: T. Springer. 1896. 8vo.  
 iv and 417 pp.

DEFECTS of method have undoubtedly impaired the value of many a treatise on International Law. This is especially the case with the well-known work of Wheaton, following as it does, though imperfectly, the in themselves misleading divisions of Klüber. What may be called a 'methodus recepta' may indeed be said now to exist, derived in the main from the Roman law distinction between *personae*, *res* and *actiones*; but departures from it are of constant occurrence, as in the work of Professor F. de Martens, and in the writings of many of the younger Italians. The labour, critical and constructive, which Dr. Heilborn has bestowed upon the 'System of International Law' is therefore by no means superfluous; and, although his inquiries have largely resulted in the re-affirmation of established classifications, he has certainly succeeded in throwing a new light, here and there, upon the essential character of certain of the conceptions which go to the building up of the science. Dissatisfied with existing systems, he sets to work to criticize his predecessors, and to re-examine the materials with which he has to deal.

The first part of his book is accordingly devoted to the subjects and objects of International Law; and more especially to human beings, territory, and ships. While admitting that states alone are international persons, Dr. Heilborn thinks it necessary to give some space to individuals, both as such, and as citizens. Here he is led to say something about slavery, expatriation, sovereigns and other state officials. He holds that the Pope, though without international personality, is an object of Inter-

national Law, inasmuch as all states are interested in the recognition by Italy of his inviolability. In the controversy whether the state is 'Herr des Gebiets,' or merely, as Fricker maintains, 'Herr innerhalb des Gebiets,' in other words, whether the right over territory is one of 'Dominium' or one of 'Imperium,' the author inclines to the former view. He assimilates coast-waters, for most purposes, to territory, properly so called. Ships are treated as exceptions to the rule that 'things have no nationality,' but they are not 'floating territory.'

The second portion of the book investigates and classifies the rights inherent in the subjects, and exercisable over the objects, which have been previously described. Of the usual list of 'Grundrechte,' Dr. Heilborn recognizes only the right which every state has to the protection of its personality (Selbsterhaltung); denying, for instance, the existence of a 'right of legation,' and justly observing that the so-called 'right of equality' is only a logical consequence of the possession of sovereignty. He adopts the division of rights into those 'gegen Jedermann' and those 'gegen einzelne, bestimmte Personen'; deriving most of the latter from treaty or from international wrong-doing. The second portion of the work ends with a chapter upon 'self-help,' including war, reprisals, and neutrality. He points out that International Law has nothing to do with the justice of a war, but regards only its conformity to accepted rules. As to its essential character, he considers the respective views of those who lay stress upon its being an un-peaceful condition, who regard it as a department of the law of international intercourse, and who describe it as a procedure for the maintenance of legal rights. According to his own view, war is a proceeding for the protection of national interests, whether they be, or be not, internationally legitimate. A war between two states is, with reference to other states, 'res inter alios acta.' How then, he asks, does the circumstance that a given state stands aside during a war between its neighbours impose upon it the burdensome duties of neutrality? These are undertaken, he shows, in obedience to no ethical instincts, but from a selfish desire not to be attacked by one or other of the belligerents. For the attainment of this end, the non-belligerent state, which, as such, is subject to none of the legal responsibilities which are involved in 'neutrality,' deliberately undertakes them and does so usually by a formal declaration. Each of the belligerents gains a corresponding benefit, by knowing that he has a possible enemy the less. One does not quite see why Dr. Heilborn should suppose that so obvious an account of the origin of neutrality is likely to startle his readers.

In the third part of the book the author classifies the materials which he has previously submitted to a searching examination. His 'System' is as follows: after an 'Introduction' dealing with the nature, sources, history, literature, and sphere of International Law, he would deal, in a 'General Part,' with the character and varieties of states, their origin and extinction, their organs and representatives; also with the objects of the science, and with International Acts (Rechtsgeschäfte). The 'Particular Part,' under 'absolute legal relations,' would treat of territory, of individuals as citizens, aliens, and office-holders, and of shipping; under 'Obligations,' after an explanation of the characteristics of obligations generally, we should get an account of those which arise *ex delicto* and *ex aliis causarum figuris* as well as of those arising from treaty. Finally, under 'Self-help,' places are assigned to reprisals and similar semi-hostile acts, to the conduct of warfare, and to the relations of belligerents and neutrals. The 'System,' it will be observed, is a mere skeleton; departing but slightly from the

distribution of the subject to be met with in most modern text-books. The originality of Dr. Heilborn's treatment lies not so much in his table-of-contents of the science as in his critical discussion of its topics in detail. He is widely read in the literature of the subject, and has bestowed much independent thought upon matters which have long suffered from conventional handling.

T. E. H.

*The Principles of International Law.* By T. J. LAWRENCE, Rector of Girton and Lecturer in Downing College, Cambridge; Associate of the Institute of International Law; lately University Extension Professor of History and International Law in the University of Chicago, U.S.A.; sometime deputy Professor of International Law in the University of Cambridge, and Lecturer in Maritime Law at the Royal Naval College, Greenwich. London and New York: Macmillan & Co. 1895. 8vo. xxi and 645 pp.

It is not only from the respect due to a title-page that we have set out Dr. Lawrence's titles in full, but also to show how large an experience he has had in teaching his subject, both in England and in the United States. This would alone suffice to claim attention for anything he writes on it, especially of an educational character, as we consider the present book to be. Nor, in spite of its name, is it less concerned with the philosophy of international law than with its substance; it distinctly aims at being a full treatise on the subject, yet it is not so full as Calvo or Phillimore, Hall or Twiss; and there is about it a something, more easily recognized than described, which points it out as being addressed more to the student than to the man of affairs. We take it as containing all that in the judgment of its author—and it is valuable to have on such a point the judgment of so experienced an authority—ought to be known or can well be known about the subject by an undergraduate taking it up as a distinct branch of study, though among others, as is done for the Law Tripos at Cambridge, and this in the way in which such an undergraduate should know it.

With regard to the principles, properly so called, we are glad to see Dr. Lawrence rejecting Austin's definition of law, as being too exclusively based on that aspect of it in which it may be considered as the command of a superior. He adopts the point of view of Hooker, who prefers to 'term any rule or canon whereby actions are framed a law' (p. 14). Dealing with the old difficulty as to the respective parts to be assigned in international law to reason and custom, or, as he calls them, ethical and historical considerations, Dr. Lawrence pronounces 'that the historical method is the correct one,' and seems in his general theory to limit the function of ethical considerations to projects of improvement or the choice between conflicting usages, the usage, however, which in the latter case is chosen, not being deemed law till it has become clear and uniform (pp. 20-24). And in details he carries out this theory with a fidelity perhaps unusual, both against new views and in favour of them, declining to state the new as law before a clear and uniform custom can be shown for it, and equally avoiding a positive declaration of the old as law when a difference has begun to arise. As an example of the latter kind, we may quote this passage: 'When a large navigable river runs in its entire course through the territory of one state, the right of exclusion' of foreign navigation from it '*probably* still remains.' The italics are ours (p. 189).

Our author's residence in the United States has given a character to his book which may be noticed in more than one place. Thus we have an interesting section on the position of the United States in America, which Dr. Lawrence appears to regard as comparable in substance to that of the Great Powers in Europe, though differently exercised in form, the machinery of conferences and congresses being inapplicable to the action of a single state (pp. 247-251). And he seems to adhere, though with hesitation, to the American decisions by which, during the civil war, the doctrine of continuous voyages was applied to the breach of blockade, though general opinion on the European continent would not extend it beyond the carriage of contraband, and what is probably a majority of English opinion rejects both applications of the doctrine (pp. 594-8).

We could wish that at pp. 490 and 493 Dr. Lawrence had not spoken of the 'neutralization' of the Suez Canal without cautioning his readers that the term is in that case used in a false sense, the ships of war of belligerents being allowed to pass through the Canal, while the forces of belligerents cannot pass through neutral territory. The careful reader will find the truth about this at p. 181, but it should have been mentioned again in the passages referred to, which occur in a section having for its marginal note 'instances of true neutralization examined.' We are aware that, in speaking of the arrangement made about the Canal as neutralization, our author is only following a general, and even an official, practice; but it is one against which we take every opportunity of protesting. Not long ago we found a leading statesman under the impression that England might safely withdraw from the Mediterranean, because the 'neutralization' of the Suez Canal would prevent an enemy from using it as the shortest passage to India.

In conclusion, we have found the book suggestive, the author's caution in laying down law being accompanied by much fertility in pointing out relevant considerations on many questions.

J. W.

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*Elements of the Law of Contracts.* By EDWARD AVERY HARRIMAN.  
Boston, Mass.: Little, Brown & Co. 1896. 12mo. xli and  
342 pp.

MR. HARRIMAN is still young, and the fact that a young man can produce a book so mature in form and workmanship as this bears the strongest witness to the superiority of the training given in the leading American law schools over the halting and feeble scheme which goes by the name of 'legal education' in the Inns of Court. The book is ingenious and original too, and that is Mr. Harriman's own merit. But let no one say that a good man will write a good book, training or no training. Great ability or great individual industry may overcome the drawbacks of defective training or no training at all; but this will not prevent the skilled workman who has served a proper apprenticeship from being known in his work. We do not hesitate to say that it would be impossible, under the present conditions, for work up to the level here maintained to be turned out by an English barrister of Mr. Harriman's standing. Whatever one may think of the author's innovations in doctrine or arrangement, this is a thoroughly workmanlike and finished performance.

One great innovation is made by Mr. Harriman in his exposition of general principles. Instead of regarding consent as a fundamental notion, he puts it in a secondary place; thinking, it would seem, that the supposed

primary importance of consent is a figment of Romanizing scholars. There is some little mistake here. Mr. Harriman can easily assure himself from the Institutes that, historically speaking, Roman law is as innocent as our own of any general theory of agreement or consent, as little capable of affording, on the face of it, any scientific or rational analysis of contract. Different conditions are necessary and sufficient to establish a cause of action upon different kinds of contracts. In only one group, the 'consensual' contracts, do we hear of *consensus*, in express terms, at all. The theory of *pactum* and *conventio*, like our own modern doctrines of offer, revocation, acceptance, and consideration, was a relatively modern scientific development, largely independent of the historical forms of action, and founded on the general facts of human nature and business, which were not essentially different under the Antonines at Rome from what they now are in London or New York. Still more is this the case with the 'modern Roman law' of the great Continental jurists. When I said last year, in words that Mr. Harriman does me the honour to quote, that we must seek a genuine philosophy of the common law, I did not mean that we are to reject out of hand all ideas that cannot prove a pure Germanic ancestry. But is it really so un-Germanic to think of agreement as the essence of contract? The *fides facta* which crops up all over Europe in the middle ages assuredly had roots in Germanic as well as Romanic custom, while on the other hand it is certain that early Germanic law did not enforce gratuitous promises even if they were formally made. Our ancestors did not wait for professors of *Pandektenrecht* to tell them that it takes two to make a bargain.

Hence Mr. Harriman's view, that the obligation of contract is an obligation both created and defined by the will of the party bound, and is essentially nothing more, has no particular historical support for its logical neatness. Turning to our law as it stands, what compels us to say that a merely one-sided undertaking, 'unifactoral obligation,' as Mr. Harriman calls it, is recognized? Practically, a single decision of the House of Lords, *Xenos v. Wickham*, L. R. 2 H. L. 296. But, after all, does it? Writers on this matter, including myself, have perhaps been in too much haste to think this a necessary conclusion. In *Xenos v. Wickham* there was no doubt that the parties had really agreed on the terms of the insurance. But, by reason of the revenue laws, the policy under seal was the only available record of the agreement. The question was whether it was to be deprived of effect because it had not been manually delivered by the insurer to the assured or his agent. The minority of the judges consulted (Willes and Montague Smith J.J.) dissented from the view of the majority, not because they thought the deed not sufficiently delivered, but because they thought the agreement was not in fact complete. It is far from clear that the House of Lords intended to lay down, or that the *ratio decidendi* does lay down, any such rule of law as that a promise made by deed is binding without regard to the promisee's assent or intention. I assume, as Mr. Harriman says nothing to the contrary, that the authority of *Xenos v. Wickham*, for whatever it does really decide, is generally received in the United States, otherwise there might be questionings and reservations on that point.

It remains true, certainly, that the word 'contract' is specially associated in our sixteenth-century books with the action of Debt, and that this action was historically and formally analogous to the real actions and had nothing to do with promises. But, since Assumpsit had for almost all practical purposes supplanted Debt before Blackstone's time, are we now to force our whole doctrine of simple contracts back into an archaic mould which our great-grandfathers had already broken? And then, one is tempted to

ask, if consent is a merely secondary element, whence are we to derive any rational guiding principle for the construction of contracts?

As to the earlier authorities referred to in *Xenos v. Wickham*, it is no doubt the law that when a party has declared himself bound in the solemn form of a deed, he or his representatives cannot be heard (apart from questions of fraud or the like) to deny that any of the ordinary conditions of liability existed. This can throw no light on the general analysis of such conditions. If the history of the Common Law is to be consulted as a guide to its actual or possible philosophy, a deed is not so much an operative as a witnessing instrument. It was conceived as a sure proof of rights, not as a means of inventing new kinds of rights. Hence the current medieval use of the past tense in such forms as '*sciatis me dedisse et concessisse*.' The feoffment is the best, as it is the most familiar illustration. As the charter of feoffment was the authentic record of a conveyance, the covenant under seal became the authentic record of a contract. Whether the form of the record is complete, and how far the record is conclusive, are wholly different questions from the nature of the matters recorded.

There are other novel points of arrangement, such as dealing with impossible agreements under the head of Construction, on which I should be more disposed to agree with Mr. Harriman. But I must forbear from any more comment at present. I will only repeat that the American students who use this book will have a book which they can trust for the actual statement of the law, and which on matters of principle will make them think.

F. P.

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*A Digest of the Law of Agency.* By WILLIAM BOWSTEAD. London: Sweet & Maxwell, Lim. 1896. 8vo. xxxvii and 394 pp. (14s.)

THE author of this work has adopted the method so effectively employed in the Digests of Sir James Stephen and Mr. Chalmers, of reducing the branch of law with which he deals to a series of abstract propositions, logically arranged under headings and articles, each of which is illustrated by the decided cases whose principles it embodies.

The work has been carefully done. We have tested the text, the cases cited, and the index, and have in each case found a clear and correct statement of the point or of the authorities for which we sought. The style is concise, and the contents are free from anything superfluous or redundant. The author does not shrink from handling his authorities somewhat critically, as when he questions the present authority of *Armstrong v. Stokes* (p. 234), or the fairness of the logical application of the doctrine of ratification in *Bolton Partners v. Lambert* (p. 41). At the same time he is most guarded and precise in stating the exact gist of the authorities he cites. The Digest will be an useful addition to any law library, and will be especially serviceable to practitioners who have to advise mercantile clients or to conduct their litigation, as well as to students, such as candidates for the Bar Final Examination and for the Consular Service, who have occasion to make the law of agency a subject of special study.

S. H. L.

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*The Law and Custom of the Constitution.* Part II. The Crown. By Sir WILLIAM R. ANSON. Second Edition. Oxford: Clarendon Press. 1896. 8vo. xxiv and 517 pp.

"On all great subjects," says Mr. Mill, "much remains to be said," and of none is this more true than of the English Constitution.'

This is the sentence which opens Bagehot's 'English Constitution,' and the thirty years which have elapsed since the publication of his incomparable work have amply confirmed the truth of his remark. When he wrote, the literature which had accumulated upon his topic was already huge, but has since that time increased both in bulk and, what is of far more consequence, in value. Writers, among whom Sir William Anson occupies a leading position, have explored the constitution from a new point of view. They have considered not so much its conventional or its historical as its legal character. As things now stand, Anson's *Law and Custom of the Constitution* has been developed into a complete guide to the mass of law which forms the basis of our English constitutional arrangements. The word 'developed' is here used of set purpose. Sir William Anson's book was from the beginning a thoroughly good piece of workmanship, but by his constant endeavours to explore more and more minutely in each edition the whole field of constitutional law, he has now made it one of the best constitutional treatises in existence. This is not the occasion to examine the merits of his work as a whole. Their nature may be best understood if we take a mere fragment of a single chapter and consider what our author has in his second and last edition of Part II of his work to tell us about the Channel Islands. Most Englishmen, we suspect, have a hazy idea that these Islands form part of the United Kingdom. No notion is of course more erroneous. It will be completely dispelled by reading six or seven of Anson's pages. The reader will there learn that the Channel Islands are the part of the Duchy of Normandy which is retained by the English Crown; that they are governed by laws essentially different from the laws of England; that they possess a constitution, and a very peculiar constitution, of their own; and that they claim a certain independence of the Imperial Parliament. That the claim should ever seriously be made good against the will of Parliament is impossible, but that Parliament should ever wish in fact to invade the theoretical independence of the Islands is happily in the highest degree improbable. The truth is that the Channel Islands in their relation to Great Britain exhibit one of the happiest instances of a constitutional anomaly which, while defying all rules of logic, is justified by its undisturbed historical existence. The least satisfactory part of the constitution of the Islands possesses for an historian the most interest. Courts which blend legislative and judicial powers are unlikely to be good tribunals, and a disciple of Montesquieu would find it hard to tolerate a confusion of powers which is dear to the Channel Islanders. But this very confusion of powers recalls that characteristic of the French 'Parliaments' which, in part at least, aroused Montesquieu's demand for the separation of legislative from judicial functions. Even in Jersey or Guernsey practical reformers may sooner or later destroy an interesting but inconvenient historical survival. Any one who reads Anson's work will be able to master in outline the peculiar constitutionalism of the Channel Islands as it now exists. If his book stimulates any youthful enthusiast for research to draw a more complete and elaborate picture of the last existing example of an antiquated form of constitution, it will render a real service to historians as well as to lawyers.

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*Russell on Crimes and Misdemeanours.* Sixth Edition. By HORACE SMITH and A. P. PERCEVAL KEEP. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1896. La. 8vo. Vol. I, lxxiv and 1045 pp.; Vol. II, lii and 1040 pp.; Vol. III, lxi and 844 pp. (£5 15s. 6d.)

RUSSELL on Crimes and Misdemeanours is one of those monumental works well known to the English lawyer, whose bulk is so vast that their process of regeneration is naturally slow. Thus though the work has now occupied a prominent position for nearly a century the present edition is only the sixth, more than a fifth of a century has elapsed since the appearance of its predecessor, and counting the two present editors as one, six editions have engaged the attention of four editors. The merits of the original work consist in the fact that it is a collection of authorities, which though they are not very recondite, the practising barrister cannot always put his hand upon in a hurry. The editors have therefore acted wisely in not attempting to carry out any radical alteration in its design and scope; but, on the other hand, they do not seem to have acted on any consistent principle in the addition of new matter, and we cannot always command their excision of the old. *R. v. Ashwell* is no doubt a very important case from some points of view; but to devote sixteen pages to reprinting four of the chief judgments copied verbatim from the Law Reports is not a very intelligent or convenient way of dealing with it. On the other hand, the decision of *R. v. Collins*, as to attempts to commit crime, has given rise to a good deal of discussion and to other decisions, which, as has before now been pointed out in our columns, are open to certain well-founded objections: all of which is duly noticed in the present work, but merely in the briefest possible footnote. It may also be noted in the same connexion that several miles of print intervene between the record of *R. v. Collins* and that of *R. v. Duckworth*, with which it is closely connected. As to excisions, we cannot but regret that the editors have devoted as much space as they have, or indeed any space at all, to decisions on repealed statutes; they are either applicable to re-enacted statutes or wholly irrelevant, generally the latter, but by being classed together in separate chapters are necessarily out of place. It may be an inevitable drawback to the book that its contents have to be investigated by means of three Tables to Statutes, Tables to Cases and Indexes; but surely it ought to be possible in so large a work to find references to all the reports of any modern case; yet in the present work it continually happens that only one report is referred to and that by no means the best. In examining the new work more in detail, some errors are naturally discovered; so some of the indictable offences under the Merchant Shipping Act pass unnoticed; we are not told on p. 754 that 42 & 43 Vict. c. 18 (the Race Courses Licensing Act, 1879) applies only to the neighbourhood of the Metropolis, and no mention is made of 53 & 54 Vict. c. 37 (the Foreign Jurisdiction Act, 1890). These however are not very serious matters, and while the old work is as valuable as ever it was, the new, as far as we have been able to test the work of twenty years, is at least accurate and painstaking.

*A Digest of the Law of Libel and Slander.* By W. BLAKE ODGERS, Q.C. Third Edition. London: Stevens & Sons, Lim. 1896. La. 8vo. lxxxvi and 841 pp. (32s.)

EVEN beginners in the Common Law scarcely need to be told that 'Odgers on Libel and Slander' has for several years been the standard work of

reference on the subject. In this third edition the author has found it needful, in consequence partly of recent decisions and partly of legislation, 'to rewrite the chapters on Trade Libel, Privilege, Malice, Injunctions, and Costs, as well as the portions of the book relating to Fair Comment, Imputations of Unchastity, Reports of Public Meetings, and Contempt of Court.' It is superfluous, for any one who knows Mr. Blake Odgers's diligence and accuracy, to say that the revision has been thoroughly done. We mention as a test case the treatment of the recent decision of the Court of Appeal in *Nevill v. Fine Arts, &c. Co.*, '95, 2 Q. B. 156, which has been noticed in no less than twelve places according to the various points it deals with.

The learned reader will find profitable criticism on both decisions and legislation. On *Pullman v. Hill*, '91, 1 Q. B. 524, it is pointed out, at p. 174, that dictating to a shorthand clerk words which do not exist in writing save as the clerk takes them down may be a slander, but cannot be the publication of a libel to the clerk; also that press-copying is not like a compositor's work in respect of publication to the person employed; inasmuch as in the former case the operator need not read the document he puts through the press, whereas a compositor must read his copy. The MS. of Louis Napoleon's proclamation of the *Coup d'État* is said to have been broken up into fragments which were separately unintelligible, to prevent any one in the Government printing-office from disclosing the plot. It would seem that in such an exceptional case—as well as where the printers do not understand the language of the text they are printing—there is no 'publication.' Again, at p. 293, Mr. Blake Odgers discusses the ambiguously worded s. 3 of the Law of Libel Amendment Act, which seems either to give an excessive immunity to newspaper reports of judicial proceedings (which, however, was not in fact the intention of Parliament), or to be only an imperfect declaration of the common law. A detailed history of the Act is given in the Appendix. Attention may be called to the excursus on the law of blasphemy (pp. 472-490) as a good piece of historical and critical work, and of much more than technical interest.

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*The Practice and Forms in Winding Up Companies and Reconstruction.*

By His Honour Judge EMDEN. Fifth Edition by D. STEWART SMITH, assisted by HENRY JOHNSTON. London: William Clowes & Sons, Lim. 1896. La. 8vo. lxxv and 806 pp. (28s.)

ALTHOUGH this book professes to be a new edition of Judge Emden's *Winding Up Practice*, the differences in arrangement and otherwise are so great that one is inclined to wonder why Messrs. Stewart Smith and Johnston did not start a new practice book on their own account and under their own names only. The fourth and earlier editions contained the practice in a number of chapters in which the statutes and rules applicable were more or less paraphrased, and these chapters were followed by a collection of forms and an appendix of statutes, rules, and orders. The editor of the new edition admits his responsibility for the change in arrangement, and perhaps nothing but experience in handling the book can show whether the new arrangement is better than the old one. Part I deals with 'matters common to all forms of winding up, whether by the Court or voluntary.' This part, by the way, commences with Chapter II. and ends with Chapter XIV, Chapter I. being 'preliminary' and coming before and outside Part I. So far the chapters are not in the form of sections and rules in numerical order with notes, adopted by Mr. Buckley,

Mr. Snow, and others; but Part II, relating to winding up by the Court, consists of the Winding Up Act and Rules, annotated—in fact, we recognize in it a new edition of the Annual Winding Up Practice which came out for two or three years under the editorship of Mr. Emden and Mr. Snow, but which, as a separate publication, is now defunct. Part III relates to voluntary winding up, with and without supervision; Part IV to reconstruction, amalgamation, and arrangements; Part V to alterations in memoranda of association and reduction of capital; and Part VI to debenture holders, receivers, and managers. Appendix I contains 271 forms, and Appendix II consists of a number of statutes from 1862 to 1893, not annotated, and the general order of 1862 and 1868. Judge Emden is not responsible for the novelty of arrangement, and the book contains several statements which possibly would not be endorsed by a quondam Registrar in Companies Winding Up. One of these is as follows: 'The Companies Winding Up Act, 1890, and the rules made under it form a complete code, which now regulates the winding up of companies by the Court, when the registered office of the company is in England or Wales.' If this were correct, Appendix II might have been shortened by omitting ss. 74 to 169 of the Companies Act, 1862, which with a few exceptions are still unrepealed, and comprise in substance that part of the Act of 1862 which related, and still relates, to the 'Winding Up of Companies and Associations under this Act.' The table of cases refers to all the current series of reports, and the printing and general 'get-up' of the book are excellent.

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*The Principles of Equity and Equity Practice of the County Court.* By ANDREW THOMSON. London: W. Clowes & Sons, Lim. 1896. 8vo. cxxxiv and 1015 pp. (32s. 6d.)

As originally intended, this book was to have the limited object of providing a kind of ready guide to County Court judges, registrars, and practitioners in County Courts in the conduct of cases on the equity side of those Courts. When, however, the work had been nearly done, and, as the author states, as an 'afterthought,' he appears to have extended his plan so as to make it also a handbook of principle and practice concerning the Chancery Division of the High Court. This extension, which is stated to have been made since the beginning of the present year, is not so obvious as the author presumes, for those portions of the book which deal with the practice in most places describe proceedings in the County Court and not in the High Court. But this, for several reasons, is but a small blemish. In the first place, the paucity of equity actions in the County Courts—a fact noted and lamented in the preface—renders it necessary in every case to consult and cite decisions on points of practice by the Chancery judges, and consequently Dr. Thomson was forced long before the extension of his plan to refer to those decisions while describing the course of proceedings in the County Court. In the next place, the jurisdiction of the superior Court, subject to the limit of amount, being almost identical with that of the High Court, the principles of equity expounded by Dr. Thomson were necessarily those which guide the superior tribunal. But taking the book as a general work on Equitable Jurisprudence and Practice, we think that it will be found useful to those who have not accustomed themselves to consulting their Seton or their Daniell, or even their plethoric White Book. Dr. Thomson's volume is a thick one—over 1,000 pages long; in it he has traced an action from start to finish, including forms of pleadings

and orders, and he has treated of administration, trusts, partition, mortgages, specific performance, the rectification and cancellation of documents, fraud, partnership, the appointment of new trustees, infants, married women. His statements of law are usually accurate and clear, and it is not his fault that the immense variety of the subjects he has handled, and the mass of judicial decisions in relation to them, have made it impossible to do full justice to each, even in the rather extended space he has allowed himself. Yet in practice it is often of much advantage to possess a book in which an outline only relating to the matter in hand is to be found, and this work will probably be often used for that purpose.

Dr. Thomson in his preface gives it as his opinion that a County Court dealing only with equity cases within the limit of £50 should be established in London, with the object of encouraging an increase in equity County Court work. It is not very clear how this result, even if otherwise desirable, would be attained by such means. It would seem that few equity matters come before the County Courts because the estates of deceased persons dealt with by administration, and the property involved in trusts and in other cases on the equity side of the Courts, are usually of greater value than the statutory limit. The increase of the amount which the County Courts might be permitted to adjudicate upon would of course augment the number of their Chancery cases, but it may be doubted whether this course would save either time or expense.

*The Grand Jury in Criminal Cases, the Coroner's Jury, and the Petty Jury in Ireland.* By WILLIAM G. HUBAND. Dublin: Edward Ponsonby. London: Stevens & Sons, Lim. 1896. La. 8vo. xxxi and 1176 pp.

THE author of this impressive work tells us in the forefront of his preface that he made a written abstract of every case he has cited and many more besides, that he placed abstracts of all the decisions on similar cases in juxtaposition, abridged the whole, and, we conclude, now considers it fit for serving up. This method of preparation is a time-honoured one, and Mr. Huband's industry and accuracy have enabled him to make the most of it; the more so as he has treated statutes and original authorities quite as fully as he has cases. The consequence is that he presents his readers with an enormous mass of valuable information relating to his subject, and his book is worthy of taking its place among the usual works of reference. We find no mention of sheriff's juries, otherwise the work seems complete. The errors we have detected are not worth mentioning, except that in referring to *Ashford v. Thornton*, 1819, 1 B. & Ald. 405, 19 R. R. 349, the author says that the latter was indicted after his wager of battle, whereby he shows that he completely misunderstands both the case as reported and the effect of 3 Hen. VII, c. 1. Thornton had already been acquitted on an indictment. After being discharged on Ashford's appeal he was arraigned on the appeal at the suit of the King, and discharged on the plea of *autrefois acquit*, as correctly stated in Stephen, Hist. Cr. L., i. 250. One defect, however, Mr. Huband shares with most of his illustrious predecessors in this monumental form of literature. His learning, though complete and well ordered, is quite undigested. We doubt whether Mr. Huband sees anything but superstition, cruelty, and force in ordeals, appeals, and wager of battle; he certainly fails to explain these matters in the least to an ignorant reader; nor is he any happier in his statement of the evolution of the petty jury or his explanation of their original functions.

The requisite information is all there, but lacks any intelligible comment. In the same way disquisitions on local venues, challenges, and other obsolete branches of knowledge are hopelessly mixed up with important decisions on modern law, without any distinction being made between the two. The author in fact cannot keep his archaeology and his law apart, and treats an obiter dictum in 13 Car. II with as much respect as he pays to the answers of the judges to the House of Lords anent Fox's Libel Act. At the same time the work contains much to interest both the practical lawyer and the man of learning, and the difficulty of finding it is reduced to a minimum by excellent arrangement and a careful index.

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*La Législation Pénale Comparée. Publiée par l'Union Internationale de Droit Pénal.* Premier volume: *Le Droit Criminel des États Européens.* Berlin: Otto Liebmann. Paris: Pedone-Lauriel. Rome: Loescher & Cie. Lisbon: Ferin & Cie. 1894. 8vo. xxvi and 706 pp. (43.75 francs or 35 marks; or, for subscribers to the complete work, 37.50 francs or 30 marks).

THE Union Internationale de Droit Pénal was founded in 1889. In 1890 it met at Bern and decided to undertake a comparative exposition of the different criminal laws which are at present in force in Europe. The enterprise was subsequently extended so as to include all the criminal laws of the world. Of this work only the first volume, which includes the criminal law of Europe, is now before us, but it is not unlikely that one or more of the subsequent portions have already been published.

The work is published in German and French simultaneously. Its plan includes, as we learn from the introduction, which is by Dr. Franz von Liszt of Halle, besides the series of separate monographs on the criminal laws of different countries which form the raw material, a general and a special part. The former is to contain three sections, dealing respectively with the sources of criminal law, the general theory of crime, and the theory of punishment. The latter will treat of particular crimes and the penalties attached to them. The present volume is composed of twelve treatises by various writers, which deal with the different European systems of law, beginning with that of France and ending with our own. They occupy, on an average, about sixty pages each.

It seems to have been considered by some members of the Union that no notice need be taken of the law of such countries as have no penal code, but it was finally apparent that no exposition would be sufficient which did not take account of the Common Law. Whether the superior 'knowability' of the law in countries where it is contained in a code renders it possible to give a fair account of the French criminal law in twenty-five pages, or of the various German systems in 108, is a question which must be left to those who have a practical knowledge of the working of the criminal law in the countries where they are in force. But any one who knows how difficult it is even for an Englishman to obtain a knowledge of our criminal law with only the assistance of the 400 or so pages of Sir James Stephen's Digest, will not fail to see that the attempt to explain our law and procedure to foreigners (as well as the not inconsiderable variations from it which are in force in Scotland) in seventy-five pages of a foreign language was not likely to be successful. It is therefore no discredit to Dr. Schuster, who has undertaken the task, to say that it is difficult to recognize our criminal law in the form in which it appears in this volume.

For example, there is no mention of the peculiarity of our procedure before trial, which consists in its publicity; and the French word 'instruction,' which is used to denote the preliminary stages both in England and in France, tends to obscure their essentially distinct character. No mention is made of the grand jury or its functions. The explanation of the peculiar difficulties which surround the questions of insanity, of homicide, and of larceny is insufficient. There is no account of the jurisdiction of the courts in extradition cases, or of the various forms of appeal in criminal cases.

Any one who uses the book for purposes of study in comparative criminal law should be careful to refer to original English sources as well.

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*A Treatise on the Law of Easements.* By J. L. GODDARD. Fifth Edition. London: Stevens & Sons, Lim. 1896. 8vo. xxxix and 605 pp. (25s.)

WHEN the fourth edition appeared, now five years ago, we thought the merits of this book already too well established to need much commendation. The same reason obviously applies with greater force to the fifth edition. One new question considered by Mr. Goddard is whether the Court can award damages instead of an injunction for a prospective injury (p. 442). He thinks not, and we are of the same opinion. It would be a strong thing to hold that Lord Cairns's Act was intended to empower or did empower any Court to award damages in a case where an action for damages could not have been brought in a court of Common Law: to hold that a right of action to recover prospective damage is known to the common law would be still stronger.

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*On the Interpretation of Statutes.* By the late Sir P. B. MAXWELL. Third Edition, by A. B. KEMPE. London: Sweet & Maxwell, Lim. 1896. 8vo. clvi and 630 pp. (21s.)

'MAXWELL on Statutes' was at once accepted as supplying a real want, and supplying it very well, when it made its first appearance twenty-one years ago. This edition is unfortunately posthumous, but Mr. Kempe has had the use of the author's latest notes, and his work has every appearance of being thoroughly and judiciously done. The table of cases gives references to all the reports.

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We have also received:—

*A Selection of Cases on the English Law of Contract.* By G. B. FINCH. Second Edition, by R. T. WRIGHT and W. W. BUCKLAND. Cambridge: at the University Press. 1896. La. 8vo. xii and 867 pp. (28s.)—The second edition of 'Finch's Cases on Contract' contains a good many new cases, but the editors have contrived to save an equivalent amount of space. For example, *Bowen v. Hall*, which does not properly belong to the law of contract, has disappeared. We have our doubts whether students will not be perplexed by the inclusion of *Derry v. Peek* and *Ward v. Hobbs*—which also are not cases of contract—without some kind of explanation. Short head-lines are now given, we presume as a compromise with the suppressed head-notes, for the benefit of those who work with the book apart from any course of lectures. We are glad to think that Mr. Finch's endeavour to

foster the study of English law at first hand in the decisions themselves has been fruitful.

*The Duties and Liabilities of Trustees.* By AUGUSTINE BIRRELL, Q.C., M.P. London: Macmillan & Co., Lim. 1896. 12mo. x and 183 pp.—This is a clear and profitable exposition, and moreover readable beyond the common habit of law-books. It is addressed to trustees and persons likely to become trustees rather than to lawyers as such, but lawyers who happen to be trustees, as a good proportion of them do, might do much worse than keep Mr. Birrell's book by them and consult it when in doubt. Not all lawyers are equity lawyers, and even among equity lawyers only those who are in constant practice can make sure offhand either of knowing the law that is in force or forgetting the law that is obsolete. Mr. Birrell dares to be quite elementary, and that is one of his chief merits. We extract one sentence as a sample: 'An enormous number of breaches of trust are occasioned either by ignorance or by forgetfulness of the actual contents of the documents creating the trust.' This we believe to be one of the truths that are often overlooked just because they are plain and obvious.

*The Criminal Law of India.* By JOHN D. MAYNE. Madras: Higginbotham & Co. London: W. Clowes & Sons, Lim. 1896. 8vo. xxxix and 1028 pp.—Time allows us only to say at present that this is much the fullest and most authoritative commentary on the Indian Penal Code yet published. We may call attention to the chapter on jurisdiction and extradition, which contains some interesting special information on the position of Europeans and servants of the Government of India in native States.

*English Statute Law revised. Being an analysis of the effect of the legislation of 1895 upon earlier Statutes relating to England.* By PAUL STRICKLAND. London: W. Clowes & Sons, Lim. 1896. 8vo. 50 pp. (2s. 6d.)—The object of this useful little book is to show the effect of the legislation of 1895 on the English Public Statutes of previous years. The Table showing the effect of the year's legislation appended to the Statutes published with the Law Reports is extremely meagre. Mr. Strickland's book, on the other hand, gives very complete information as to the changes made during the year in the statute law. We hope that Mr. Strickland's venture will obtain so much success as will induce him to repeat it yearly.

*The Statutory Trust Investment Guide.* By R. MARRACK. Particulars as to investments by F. C. Mathieson & Sons. Second Edition. London: Effingham Wilson. 1896. 12mo. xv and 330 pp. (6s. net).—This little book contains a good deal of useful information for trustees. The present edition incorporates the text of the Trustee Acts 1893 and 1894 and the appropriate sections of the Indian Trusts Act, 1882. The particulars as to eligible investments are comprehensive and apparently trustworthy.

*Death Duty Tables.* By A. W. NORMAN. London: W. Clowes & Sons, Lim. 1896. La. 8vo. 343 pp. (25s. net).—This book is a wonderful compilation of figures. It contains Tables for valuing Successions and Annuities under the Succession Duty Act, 1853; the Scale of Estate Duty under the Finance Act, 1894, and of the Succession and Legacy duties, from the minimum of 1 to the maximum of 1½ per cent. Several examples of the application of the tables are given at the end of the book.

*A Short History of Solicitors.* By E. B. V. CHRISTIAN. London: Reeves & Turner. 1896. 12mo. xiv and 255 pp.—Mr. Christian has gone to the right sources for his history both ancient and modern, and set it forth in a form both scholarly and readable.

*The Law of Nature and Nations in Scotland.* By W. G. MILLER. Edinburgh: W. Green & Sons. 1896. 8vo. xvi and 141 pp.—Mr. Miller thinks it a strange oversight that the Society of Comparative Legislation does not take any special notice of Scotland. We believe the Society, as at present advised, is of opinion that Scotland has not a separate Legislature. It does not deal with legal history in general. For the rest, Mr. Miller has put together some interesting local information.

*A Digest of Civil Law for the Punjab.* By Sir W. H. RATTIGAN. Fifth Edition. London: Wildy & Sons. Lahore: Civil & Military Gazette. 1896. 8vo. xxxii and 275 pp.

*A Guide to Criminal Law,* intended for the use of students for the Bar Final and for the Solicitors' Final Examinations. By CHARLES THWAITES. Fourth Edition. London: G. Barber. 1896. 8vo. 138 pp. (7s. 6d.)

*The Law and Practice relating to County Court Appeals.* By DANIEL CHAMIER. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1896. 8vo. xv and 125 pp. (10s.)

*A Digest of the Law of Bills of Exchange.* By His Honour JUDGE CHALMERS. Fifth Edition. 1896. London: Stevens & Sons, Lim. 8vo. lviii and 434 pp. (18s.)

*Hints as to advising on Title.* By W. H. GOVER. Third Edition. London: Sweet & Maxwell, Lim. 1896. 8vo. xli and 207 pp. (8s.)

*Ruling Cases.* Edited by ROBERT CAMPBELL. With American Notes by IRVING BROWNE. Vol. VII. Conversion—Counsel. London: Stevens & Sons, Lim. Boston, Mass.: Boston Book Co. 1896. La. 8vo. xxv and 731 pp. (25s.)

*The Revised Reports.* Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XXIV. 1821-1824 (Turner & Russell; 1 Simons & Stuart; 5 Barnewall & Alderson; 1 Dowling & Ryland; 3 Broderip & Bingham; 7 & 8 Moore; 10 Price). London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1896. La. 8vo. xv and 799 pp. (25s.)

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*The Editor cannot undertake the return or safe custody of MSS.  
sent to him without previous communication.*

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# THE LAW QUARTERLY REVIEW.

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## NOTES.

### A NEWLY DISCOVERED ORDINANCE.

**M**AGNA CARTA as issued in 1217 contained the following chapter:—

‘Nullus liber homo de cetero det amplius alicui vel vendat de terra sua quam ut de residuo terre sue possit sufficienter fieri domino feodi servitium ei debitum quod pertinet ad feodum illud.’

The precise effect of this provision has been much discussed. Mr. Challis remarks that ‘the practical result of the partial restraint upon alienation imposed by Magna Carta, cap. 32, was that lords exacted a fine upon alienation as the price of their consent, without which the tenants could not make a safe title.’ On the other hand, the authors of the History of English Law before the Reign of Edward I take the view that the consent of a mesne lord to an alienation by his tenant was not required so long as this ‘vague provision’ was not violated. But whatever may be its meaning, tenants in chief during the latter half of the thirteenth century and long afterwards required the king’s leave before alienating any part of their lands. Thus in the forty-fourth year of Henry III Gilbert de Preston obtained licence<sup>1</sup> from the king to assign a portion of his manor of Gretton in the county of Northampton; and on the early Fine Rolls of Edward I we find writs ordering the sheriffs to seize into the king’s hands lands alienated without his licence. Clearly at this time a tenant in chief had not free power of alienation; though earlier in the reign of Henry III there are no traces of any consent on the king’s part being required. Even when *Quia Emptores* declared that every free man should have the right of selling his lands at his own pleasure, it was judicially decided that this statute did not apply to tenants in chief; and the law remained unaltered until 1327, when another statute provided that the king should only be entitled

<sup>1</sup> Pat. Roll 71, m. 9.

to a reasonable fine on alienation, and not to a forfeiture if the lands were alienated without his licence.

Now the Year Books show that in the reign of Edward III the origin of this restraint was discussed more than once in open court. One lawyer thought it dated from the twentieth, another from the thirtieth year of Henry III. They speak of the king's prerogative, referring, no doubt, to chapter viii of *Prerogativa Regis*, one of the *Statuta Incerti Temporis*. A few years later we find a statement on the Rolls of Parliament<sup>1</sup> that the restraint was commenced in the time of Edward I by the *Prerogativa Regis*. But this statute, if it can be called a statute, was certainly not enacted in the twentieth or the thirtieth year of Henry III, for the name of Edward I occurs in its fourth chapter. Possibly the date assigned to it in the Rolls of Parliament is correct; but the rest of the statement there is undoubtedly false. The true origin of the restriction is an ordinance published in the fortieth year of Henry III, the existence of which has hitherto escaped the notice of historians.

It is in these words:—

'Rex<sup>2</sup> vicecomiti Eboraci salutem. Quia ad dampnum nostrum grauissimum et Corone et dignitatis regie lesionem intollerabilem est manifeste quod quilibet ingreditur baronias et feoda que de nobis tenentur in capite in regno et potestate nostra pro voluntate eorum qui baronias et feoda illa de nobis tenent per quod wardas et escaetas amittimus et barones nostri et alii qui baronias et feoda illa de nobis tenent adeo decrescunt quod seruicia nobis inde debita sufficienter facere nequeunt vnde corona nostra grauiter leditur quod diucius nolumus sustinere de consilio nostro prouidimus quod nullus decetero baroniam vel aliquod feodum quod de nobis teneatur in capite per empcionem uel alio modo ingrediatur sine assensu et licencia nostra speciali. Et ideo tibi precipimus districte in fide qua nobis teneris et sicut te ipsum et omnia tua diligis quod non permittas aliquem decetero baroniam aut aliquod feodum quod de nobis teneatur in capite in balliua tua per empcionem aut alio modo ingredi sine assensu et licencia nostra speciali. Et si quis baroniam aut feodum aliquod quod de nobis tenetur in capite in balliua tua contra hanc prouisionem nostram ingrediatur tunc terram quam eo modo ingressus fuerit capias in manum nostram et eam saluo custodias donec aliud inde preceperimus. Et ita te habeas in hoc mandato nostro exequendo quod pro defectu uel negligencia tua dampnum in hac parte aut lesionem corone vel dignitatis nostre non sustineamus propter quod ad te et tua grauiter carere<sup>3</sup> debeamus. Teste Rege apud Bristolium xv die Julii.

'Eodem modo mandatum est singulis vicecomitibus Anglie. Teste ut supra.'

This ordinance occurs on the Close Roll of the year of its publication, close to the *Provisio de anno bissextili et die* of the Statutes

<sup>1</sup> Rot. Parl. ii. p. 265.

<sup>2</sup> Close Roll 74, m. 7, in dorso.

<sup>3</sup> sic.

of the Realm; and it is remarkable that it should have remained so long undiscovered. The introductory recital which speaks of the loss of wardships and escheats bears some resemblance to that of *Quia Emptores*, and shows that the restraint on alienation of lands held of the king in chief arose from a different cause from that of the thirty-second chapter of the Magna Carta of 1217. Finally, our ordinance sets at rest the question of the right of mesne tenants to alienate without the consent of their lords. If before the year 1256 the king's tenants could alienate without licence, we may be quite sure that mesne tenants could do likewise.

G. J. TURNER.

#### TALTARUM'S CASE.

The true name of this case is Talcarn's or Talcarn's. Professor Maitland has already noticed (L. Q. R. ix. 1) that the fourth letter of the name is a *c*, not a *t*, so only the seventh and eighth need comment. The seventh will read either as an *u* or as an *n*; if it be an *u*, the horizontal line drawn above it in the roll will undoubtedly represent an *n*. But if it be an *n*, the horizontal line will either be a flourish, or it will represent a final *e*. The last letter of Glyn, the name of Thomas 'Taltarum's' attorney, has a similar line above it, and so have many other names on the same roll ending in *n* or *ne*. There are two places called Tolcarn in Cornwall, and Tolcarn is a Cornish family name. On the other hand, Taltarum lives only in the Year Books. The name of Talcarn occurs frequently on the De Banco Rolls *tempore* Edward IV, and it is always written in the same fashion. One litigant was Talcarn of Talcarn, surely he was not Taltarum of Taltarum!

G. J. TURNER.

Mr. Thomas Barclay, in his article on the Nationality of Children (LAW QUARTERLY REVIEW, vol. xii. p. 280), states that nothing in the Naturalization Act, 1870, qualifies a naturalized British subject to be the owner of a British ship. This seems to be an error. Section 7 confers on a naturalized British subject all the rights of a natural born British subject, and the provision in section 14 that nothing in the Act shall qualify an alien to be the owner of a British ship applies only to unnaturalized aliens, and is intended to withdraw British ships from the operation of section 2 conferring a general right of holding real and personal property on unnaturalized aliens.

The Merchant Shipping Act of 1894, section 1, enumerates naturalized persons amongst those who are qualified to be owners of British ships, but adds the additional requirement that during the time a naturalized person is owner, he shall be either resident in Her Majesty's dominions or partner in a firm actually carrying on

business there. The section also requires that he should have taken the Oath of Allegiance, but in this respect it adds nothing to the Naturalization Act, which already requires that ceremony as a condition precedent to the certificate of naturalization taking effect.

THOMAS GREEN.

In no province of law do American decisions tell for so much with English judges as in the domain of private international law, and no American tribunal enjoys, on the whole, anything like the repute of the Supreme Court of the United States. Our readers therefore will do well to note the case of *Hilton v. Guyot*, 159 U. S. 113.

That case decides that a judgment for a sum of money rendered by a Court of a foreign country having jurisdiction of the cause and of the parties in a suit brought by one of its citizens against an American citizen is *prima facie* evidence only, and not conclusive of the merits of the claim in an action brought in the United States upon the judgment, if by the law of the foreign country, as in France, judgments of American Courts are not recognized as conclusive.

This decision claims to be grounded in principle on English authorities, which are set forth with extraordinary learning and elaboration by Mr. Justice Gray, who delivers, and it may be conjectured, drew up, the judgment; but an English critic, whilst feeling the most unfeigned deference both for the Supreme Court and for the very eminent judge who was on this occasion their spokesman, must pronounce the judgment to be erroneous in principle. That this is so appears from the following considerations.

1. No English judgment or English writer of authority sanctions the doctrine of reciprocity.

2. The notion that a judgment is merely *prima facie* evidence of a debt, though many dicta can be cited in its support, is in reality obsolete, and as has been pointed out by lawyers of authority, is inconsistent with the effect now given in England to the judgments of foreign courts of competent jurisdiction.

3. The judgment in *Hilton v. Guyot* rests in substance on the untenable doctrine that rights acquired under the law of a foreign country are recognized in England or in the United States out of comity or politeness, whence logically enough follows the conclusion that such recognition depends upon reciprocity. If France has not the good manners to enforce an American judgment, American Courts may, it is argued, show their displeasure by refusing to enforce a French judgment. What is forgotten by those who adopt this point of view is that the extra-territorial

recognition of rights is a matter of justice or of expediency in a wide sense of that term. It has nothing whatever to do with courtesy.

4. The decision in *Hilton v. Guyot* rests at bottom on the failure of the majority of the Supreme Court to perceive that the so-called enforcement of a foreign judgment is in truth nothing but the recognition of a right acquired by *A* against *X* under a foreign law. There is much to be said for, and something, perhaps, though not much, against the recognition by one country of rights acquired under the law of another country, or to use a brief term of foreign rights; but whatever reasons there are for recognizing a duly acquired foreign right at all tell in favour of giving effect to a right acquired under a foreign judgment. Such a right is simply one among many rights acquired under foreign law. On this matter the dissenting opinion of the minority of the Supreme Court admirably hits the true point. 'In any aspect,' says Chief Justice Fuller, 'it is difficult to see why rights acquired under foreign judgments do not belong to the category of private rights acquired under foreign laws. Now the rule is universal in this country that private rights acquired under the laws of foreign states will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the state where it is sought to be done.'

This is good logic and sound doctrine; it is propounded by the Chief Justice and supported by three other judges of eminence. The Supreme Court is not bound by its own decisions, and every one who perceives the importance of the extra-territorial recognition of rights must hope that the Court will soon overrule *Hilton v. Guyot*.

The decision of the Court of Appeal in *Pugh v. L. B. & S. C. R. Co.* ('96, 2 Q. B. 248, 65 L. J. Q. B. 521) avoids expressing actual dissent from that of the Judicial Committee, which has been freely criticized by private writers, in *Victorian Ry. Commissioners v. Coultas* (13 App. Ca. 222). But it certainly tends to diminish the weight of that case in English Courts. The Judicial Committee held that physical illness caused by fright, which fright was a natural consequence of the defendant's negligence, is too remote a consequence to be a cause of action. The Court of Appeal has held that incapacity to follow a signalman's employment, due to a shock to the nerves caused by the responsibility of suddenly dealing with imminent danger, is within a policy covering accidents on duty. This, we submit, is both better sense and better law than the doctrine of the Judicial Committee.

We cannot live in a world where nobody is to be trusted, nor does the law require us to adopt so cynical an attitude towards our fellow-men. It requires of us care, not suspicion. It requires the auditor, for instance, to be as Lopes L.J. said in *In re Kingston Cotton Mills Co.* ('96, 2 Ch. 279, 65 L. J. Ch. 673, C. A.), a watch-dog, not a bloodhound. He must inquire into the substantial accuracy of a balance sheet, not merely verify the arithmetic, but he is not to be held liable for not tracking out carefully laid schemes of fraud. He is not an insurer: he does not even guarantee that the books of a company do correctly show the true financial position of the company. If a trusted manager of a company fraudulently inflates the stock account, as he did in *In re Kingston Cotton Mills Co.*, the auditor has a right to assume, if there is nothing to excite his suspicion, that the manager's statement is correct—for looking at it from a practical point of view how can he, the auditor, go through the stock himself? He is incompetent for such a task. So, if the company does part of its business abroad, the auditor cannot be expected to verify the fluctuating rates of exchange; and in the case of a society which receives subscriptions he not only does but must take the treasurer's word for it that all subscriptions paid direct to the treasurer have been accounted for. But more than that, the auditor is entitled to say to the shareholders to whom he makes his report, 'These persons, the manager, the directors, &c., are your appointees. I assume—I have a right to assume, as against you at all events—that their statements are trustworthy.' It may be said, it was said in the *Kingston Cotton Mills* case, 'What is the use of an auditor if he cannot discover fraud?' The answer is that no one, auditor or anybody else, can always detect or prevent fraud, but the scrutiny of an audit, imperfect as it may be, does in practice deter very effectively the would-be perpetrators of fraud.

The would-be repealers of section 25 of the Companies Act, 1867—the cash payment section—may find an apt illustration for their text in two recent cases, *In re Veuve Monnier et Fils* ('96, 2 Ch. 525, 65 L. J. Ch. 748, C. A.) and *In re Alkaline Co.* (12 Times R. 534). The first was a case of a mortgagee advancing £1,600 to a company on shares which he innocently imagined to be paid up; and of course losing his loan as well as paying ten times its amount in calls. The other was a case of gentlemen of the fashionable world, unacquainted with the arts of the promoter, accepting a bonus share of £1,000 a piece for subscribing some of the capital, and finding their bonus transmuted into a serious liability. They were hard cases, no doubt, but the true moral of them is that unsophisticated laymen must not enter into con-

tracts affected by section. 25 without advice. Section 25 is a dangerous kind of explosive and can only be safely handled by experts. The Statute of Frauds is a similar instance of a statute which may and does work injustice at times. Nevertheless the Statute of Frauds embodies an important principle of public policy—that certain classes of contract are not to be left to rest on the frail testimony of memory—and we must take the bad with the good. Section 25, too, embodies an important principle, viz. that where a company has the privilege of trading with limited liability, the privilege is only to be purchased on the terms that the limited capital shall not be a sham. It would speedily become so if shares were allowed to be paid for in any kind of consideration without any certain criterion of value. Compared with the maintenance of this,—the first condition of soundness in co-operative trading, occasional hardship to individuals is mere dust in the balance.

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Alienability is an incident of property, but there are exceptions to the rule grounded on public policy—witness pensions, for instance, and half-pay and separate estate. We do not wish to see valour in rags or a too tender wife kissed or kicked out of her property. Alimony is another instance of inalienability—has long been so—but is maintenance? That was the question for the Court of Appeal in *Watkins v. Watkins* (65 L. J. P. 75, C. A.). There is this difference between alimony and maintenance, that where alimony is given the parties, though divorced from bed and board, are still man and wife; in the case of maintenance the marriage is dissolved, they are thenceforth strangers to one another. But this difference does not go deep. The real reason for inalienability seems to be found in the nature of the marriage institution. Marriage is more than an ordinary contract. It is a matter of public concern, a peculiarity evinced among other things by this, that it cannot be dissolved by consent. The Court has to be invoked, and when invoked it grants relief on terms, and these are such as will best secure to the estranged spouses, to the wife in particular who suffers most, respectability as a member of society and an independence equivalent in a way to what she would have enjoyed had the marital obligation to supply her with necessities continued. For though love, honour, and obedience have gone, citizenship remains. This is the policy of the law, and alienability of the provision designed by the Court would defeat it as much in the case of maintenance as alimony.

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The zeal of the reformer and his indiscretion are proverbial; and the Legislature is not exempt. Nearly twenty years ago in *In re*



*Ford and Hill* (10 Ch. Div. 365, 370), James L.J., protesting against 'new-fangled requisitions,' spoke of the 'expense and delay in the investigation of titles' as already 'almost a disgrace to the law of the country.' Two years afterwards the Conveyancing and Law of Property Act was passed, with a view of cheapening conveyancing, and curtailing its diffuser graces, and the policy of that very drastic measure was to accomplish its object by throwing all the costs of conveyancing obstruction—what may be called vexatious requisitions—on the purchaser. The vendor was (and is) still to supply a complete and proper abstract of title for the statutory period, but when it came to verifying it the purchaser was to pay for everything which the vendor did not happen to have in his possession. In *In re Stuart and Olivant and Seadon's Contract* ('96, 2 Ch. 328, 65 L. J. Ch. 576, C. A.) we get the latest result of this policy, and it is certainly startling. A vendor says in his conditions, 'My title is to commence with a certain lease.' The purchaser looks into the abstract and says, 'I want to see this root of title of yours—this lease. Where can I inspect it?' 'Oh!' says the vendor carelessly, 'I don't know where it is. If you want to see it you must find out at your own expense. You can have an attested copy on completion. Section 3 (6) of the Conveyancing Act protects me:' and the Court of Appeal was constrained to admit that it did. Most people will agree with Lindley L.J. that the Legislature has 'gone a little too far' here.

Insurance law grows apace. It is a prudential if a speculative age. Even the man in the street appreciates the advantages of eliminating chance from his calculations, of covering every risk, whether it is the risk of getting a company's capital subscribed, of having his spoons and forks burgled, his licence refused, or of slipping on a piece of orange peel. Accident insurance seems especially to come home in these days to men's bosoms, and as a consequence not only law but metaphysics has been enriched with discussions on what is an accident and the nice discrimination of the Aristotelian causes. The question in *Stokell v. Heywood* (65 L. J. Ch. 721) was not so deep. It was only whether the contract contained in an accident policy is an annual contract or whether it is like the contract in a policy of life insurance. This has not merely an academic but a practical interest, as *Stokell v. Heywood* shows. Thus X begins by taking out an accident policy. Then he executes a creditor's deed in terms covering the benefit of the policy, then he pays the next annual premium, and lastly he meets with his accident. To whom do the policy moneys belong? The trustee of the creditor's deed argued that he ought to have them, but the

Court said 'No.' The contract when the second premium was paid was a new contract and outside the security. The policy in such cases is not reissued, but the new contract is defined by reference to the terms of the original policy.

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Trustees are still making the law—at their own expense—for the benefit of the public, still unable to live up to the great exemplar of the Chancery Courts. Someone, if we remember right, once wrote a history of Lord Macaulay's schoolboy, showing how that phenomenon came by his portentous knowledge. An interesting biography might similarly be written of the ideal trustee—the ordinary 'prudent man of business'—showing how that bundle of wisdom and virtues came to his present perfection. As a commercial character we are of course not surprised to hear that this paragon is careful to distinguish between the 'outside' broker and the 'inside' broker, and is aware, to use Stirling J.'s phrase, that the former does not 'enjoy so high a reputation as a member of the Stock Exchange.' We concede him so much knowledge of the seamy side as perhaps elementary in the City, but he is also possessed, we now know, of an intimate knowledge of the routine of business in general and stockbroker's business in particular. Here it was that the trustee in *Robinson v. Harkin* ('96, 2 Ch. 415, 65 L. J. Ch. 773) failed to come up to the requisite standard. He had £2,700 to invest, and he told his broker to buy stocks, but instead of waiting for the bought and sold note he handed over the cheque at once to the broker. The sight of the means to do ill deeds makes ill deeds done, and so it proved here. If the trustee had only kept to the routine of business the broker's delinquencies would not have signified. Unfortunately for him he did not. As Blackstone remarks of the formal and orderly parts of deeds, they have been well considered and settled by the wisdom of successive ages, and it is not prudent to depart from them without good reason or urgent necessity; so have the forms of business (stockbroking included) been settled by usage, and it is not prudent to depart from them without good reason or urgent necessity. The law cannot well require less than this of those who are entrusted with the management of other people's money, but the average trustee had better realize before it is too late that this ideal trustee whom courts of equity are so fond of parading, and whom he has to live up to, is something by no means 'ordinary.' The Common Law does not require 'consummate care,' except when one is dealing with dangerous instruments, such as fire-arms. Perhaps wills and settlements are dangerous instruments in the eye of a court of

equity. That wills, especially the amateur will, are often so in fact has been many times proved by experience.

A dog is in popular phrase allowed his first bite. He must not it is true bite a sheep or a cow at all, but that is only because he is limited by special legislation (28 & 29 Vict. c. 60), dispensing with proof of the scienter in such a case—a sheep being a special frailty. To make up for this deprivation a dog may now it seems bite a goat without losing his character (*Osborne v. Chocqueel*, '96, 2 Q. B. 109, 65 L. J. Q. B. 534), and if a goat why not a horse, a pig or a dog? 'Man superior walks,' and in his case the dog must be satisfied with his first bite.

The curious assumption in *Osborne v. Chocqueel* is that the dog must be 'accustomed to bite mankind,' but there are plenty of old cases where the declaration laid was that the dog was accustomed to bite animals. Thus we have '*ad mordendum oves consuetum*,' and again the choice declaration that the defendant kept a mastiff '*sciens* that he was *assuetum ad mordendum porcos*, which mastiff bit the plaintiff's sow great with pig, so as she died of the biting.' Really what the law regards is temper, evidence of savageness. If a dog will bite a goat surely that ought to put his owner on his guard as to his biting propensities. Somewhat oddly Lord Russell, while enlarging the dog's charter in *Osborne v. Chocqueel*, is for abolishing the scienter doctrine altogether, and so putting men in as good a position as sheep under the Act of 1865. This is a bold dictum. A good many dogs are undeniably unworthy of the privileges the law allows them, but so are men. An honest dog would be sadly humiliated at being branded *ferae naturae*, and to the dog owner such a doctrine would be highly oppressive.

Persons who make a profession of seeking out unclaimed funds are doubtless entitled to a reasonable commission from their clients. But they will have to learn from the wholesome judgment of Romer J. in *Rees v. De Bernardy* ('96, 2 Ch. 437, 65 L. J. Ch. 656) that it is not a safe way of doing business, with clients who are ignorant and helpless, to cry halves before giving any real information. The law of champerty is perhaps not very lucidly stated in the old books, but our ancestors were no fools when they made it. Maintenance, though generally discouraged, is venial in the eye of our law as compared with champerty, and may even be meritorious if it proceeds from the desire to help a kinsman to his just rights, or charity to a servant or poor neighbour; but no blood relationship or even collateral interest will redeem champerty, which involves besides the vices of maintenance, a kind of corrupt and often unconscionable bargain. The defendant in this case tried

to disguise his transaction as merely giving information, but the truth peeped out when the Mrs. Cluppins of this legal romance gave her view of the bargain as 'one half for the trouble of getting.' That is exactly what the law disallows.

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What are the turnings and doublings of the hare to those of a married woman with a pack of creditors after her? Now it is no property and no contractual capacity, now restraint on anticipation, now acting as agent of her husband. The married woman in *In re Dagnall* (40 Sol. J. 731) struck out a new line which certainly exhibited genius of a high order. She had carried on business separately from her husband. She had contracted debts. She could not pay her debts. So to solve her difficulties she simply dropped her business and then she said, 'Now I am not a married woman carrying on business within the meaning of the Married Women's Property Act, 1882. I did carry it on once, but I don't now, and I can't be made a bankrupt.' It would have been unfortunate if this simple device had been allowed to defeat the Act, but the reasoning which the Court used to dislodge the lady from her position, viz. that a trader must be deemed to be carrying on a business so long as any debts incurred in it remain unpaid, is certainly artificial. The doctrine at all events has twice been disclaimed by the Court of Appeal under the Bankruptcy Act, 1869, though it found favour under earlier Bankruptcy Acts, but in dealing with the provoking Protean evasions and subterfuges of the married woman perhaps the Court contracts a little of her unscrupulousness. She must really elect soon whether she will take the benefits and burdens of independence or of dependence. She cannot have both much longer.

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In July Prof. Liebermann read a paper before the Royal Academy of Sciences in Berlin, which is quite a dramatic example of the importance of minute critical work in correcting historical generalities. It was the common opinion—and borne out by the ultimate authorities in their current form—that trial by ordeal was unknown in England before the Danish period. But now comes Prof. Liebermann and produces passages from the dooms of Ine which have been supposed to relate to buying and selling (the common word *ceap*), though no satisfactory sense could be obtained; whereas the true reading of the MSS. turns out to be the less common word *ceac*, a cauldron or kettle, and the subject-matter is the water ordeal. The word *ceap* actually occurs in the same sentence in one of the passages, so that the corruption was almost inevitable. What is most curious is that the reading *ceac*

was known to earlier editors, but its meaning was not perceived, and it was treated as a clerical error or dialectic variant (*Sitzungsberichte der kgl. preuss. Akad. der Wissenschaften zu Berlin*, xxxv. 829). The result is that the water ordeal, at all events, was familiar in Wessex in the days when it was a separate kingdom, and the notion of procedure by ordeal being a Frankish importation must be greatly modified if not wholly discarded.

The history of the duel is a subject by no means remote from legal antiquities; for the modern duel, founded on the point of honour, was long supposed to have been in some way derived from the regular judicial combat or *iudicium Dei*. But Mr. George Neilson showed some time ago in his excellent book 'Trial by Combat' that this will not hold for England. The persistence of the judicial form, which obviously has nothing to do with chivalry, knightly weapons, or the point of honour, down to quite modern times, is an advantage to the British historian. Now Dr. Georg von Below has exploded the legend (which apparently rested on a dictum of Montesquieu—a great man, but often hasty) for Germany likewise (*Zur Entstehungsgeschichte des Duells*, printed at Münster as an academic dissertation). This essay is in the nature of a supplement to another work which we have not seen. According to Dr. von Below the first appearance of the modern duel was in Spain in the latter part of the fifteenth century. Can there be any question of a Moorish element? At any rate the Germanic trial by battle stands clearly absolved of any share in the parentage of the lie seven times removed, and the other elaborate follies which one may read in Alciati and Saviolo.

The learned author of 'The Principles of Equity' points out a slip in our notice of the book which appeared in the July number (pp. 292, 293). Dr. Thomson is stated to advocate the establishment in London of a County Court 'dealing only with equity cases within the limit of £50.' This should have been £500, a cipher having dropped out in the press. The learned author also points out in justification of the title of the work, that while the *practice* is that of the County Court, the *principles* are those of both the High Court and the County Court.

*It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.*

INTERNATIONAL LAW<sup>1</sup>.

**M**Y first words must be in acknowledgment of the honour done me, by inviting me to address you on this interesting occasion. You are a congress of lawyers of the United States met together to take counsel, in no narrow spirit, on questions affecting the interests of your profession; to consider necessary amendments in the law which experience and time develop; and to examine the current of judicial decision and of legislation, state and federal, and whither that current tends. I, on the other hand, come from the judicial bench of a distant land, and yet I do not feel that I am a stranger amongst you, nor do you, I think, regard me as a stranger. Though we represent political communities which differ widely in many respects, in the structure of their constitutions and otherwise, we yet have many things in common.

We speak the same language; we administer laws based on the same juridical conceptions; we are co-heirs in the rich traditions of political freedom long established, and, we enjoy in common a literature, the noblest and the purest the world has known—an accumulated store of centuries to which you, on your part, have made generous contribution. Beyond this, the unseen 'crimson thread' of kinship, stretching from the mother Islands to your great Continent, unites us, and reminds us always that we belong to the same, though a mixed, racial family. Indeed the spectacle which we, to-day, present is unique. We represent the great English-speaking communities—communities occupying a large space of the surface of the earth—made up of races wherein the blood of Celt and Saxon, of Dane and Norman, of Pict and Scot, are mingled and fused into an aggregate power held together by the nexus of a common speech—combining at once territorial dominion, political influence and intellectual force greater than history records in the case of any other people.

This consideration is prominent amongst those which suggest the theme on which I desire to address you—namely, International Law.

The English-speaking peoples, masters not alone of extended territory but also of a mighty commerce, the energy and enterprise

<sup>1</sup> An address delivered at the annual meeting of the American Bar Association held at Saratoga Springs, New York, on August 19, 1896.

of whose sons have made them the great travellers and colonizers of the world—have interests to safeguard in every quarter of it, and, therefore, in an especial manner it is important to them, that the rules which govern the relations of states *inter se* should be well understood and should rest on the solid bases of convenience, of justice and of reason. One other consideration has prompted the selection of my subject. I knew it was one which could not fail, even if imperfectly treated, to interest you. You regard with just pride the part which the judges and writers of the United States have played in the development of International Law. Story, Kent, Marshall, Wheaton, Dana, Woolsey, Halleck and Wharton, amongst others, compare not unfavourably with the workers of any age, in this province of jurisprudence.

International Law, then, is my subject. The necessities of my position restrict me to, at best, a cursory and perfunctory treatment of it.

I propose briefly to consider what is International Law; its sources, the standard—the ethical standard—to which it ought to conform, the characteristics of its modern tendencies and developments, and then to add some (I think) needful words on the question, lately so much discussed, of International Arbitration.

I call the rules which civilized nations have agreed shall bind them in their conduct *inter se* by the Benthamite title ‘International Law.’ And here, Mr. President, on the threshold of my subject I find an obstacle in my way. My right so to describe them is challenged. It is said by some that there is no International Law, that there is only a bundle, more or less confused, of rules to which nations more or less conform, but that International Law there is none. The late Sir James F. Stephen takes this view in his ‘History of the Criminal Law of England,’ and in the celebrated *Franconia* case (to which I shall hereafter have occasion to allude) the late Lord Coleridge speaks in the same sense. He says, ‘Strictly speaking “International Law” is an inexact expression and it is apt to mislead if its inexactness is not kept in mind. Law implies a lawgiver and a tribunal capable of enforcing it and coercing its transgressors.’ Indeed it may be said that with few exceptions the same note is sounded throughout the judgments in that case. These views, it will at once be seen, are based on the definition of law by Austin in his *Province of Jurisprudence Determined*, namely, that a law is the command of a superior who has coercive power to compel obedience and to punish disobedience. But this definition is too narrow; it relies too much on force as the governing idea. If the development of law is historically considered, it will be found to exclude that body of customary law which in early

stages of society precedes law which assumes, definitely, the character of positive command coupled with punitive sanctions. But even in societies in which the machinery exists for the making of law in the Austinian sense, rules or customs grow up which are laws in every real sense of the word, as for example, the law merchant. Under later developments of arbitrary power laws may be regarded as the command of a superior with a coercive power in Austin's sense: '*Quod placuit principi legis vigorem habet.*' In stages later still, as government becomes more frankly democratic, resting broadly on the popular will, laws bear less and less the character of commands imposed by a coercive authority, and acquire more and more the character of customary law founded on consent. Savigny, indeed, says of all law, that it is first developed by usage and popular faith, then by legislation, and always by internal silently operating powers, and not mainly by the arbitrary will of the lawgiver.

I claim then that the aggregate of the Rules to which nations have agreed to conform in their conduct towards one another are properly to be designated 'International Law.'

The celebrated author of Ecclesiastical Polity (the 'judicious' Hooker) speaking of the Austinians of his time says:—'They who are thus accustomed to speak apply the name of Law unto that only rule of working which superior authority imposeth, whereas we, somewhat more enlarging the sense thereof, term every kind of rule or canon whereby actions are framed, a law.' I think it cannot be doubted that this is nearer to the true and scientific meaning of law.

What then is International Law?

I know no better definition of it than that it is the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another.

Is this accurate and exhaustive? Is there any *a priori* rule of right or of reason or of morality which, apart from and independent of the consent of nations, is part of the law of nations? Is there a law which nature teaches, and which, by its own force, forms a component part of the law of nations? Was Grotius wrong when to International Law he applied the test *placuit-ne Gentibus*?

These were points somewhat in controversy between my learned friend, Mr. Carter, and myself before the Paris Tribunal of Arbitration in 1893, and I have recently received from him a friendly invitation again to approach them—this time in a judicial rather than in a forensic spirit. I have reconsidered the matter, and, after the best consideration which I can give to the subject, I stand by the proposition which in 1893 I sought to establish. That proposi-



tion was that International Law was neither more nor less than what civilized nations have agreed shall be binding on one another as International Law.

Appeals are made to the law of nature and the law of morals, sometimes as if they were the same things, sometimes as if they were different things, sometimes as if they were in themselves International Law, and sometimes as if they enshrined immutable principles which were to be deemed to be not only part of International Law, but, if I may so say, to have been pre-ordained. I do not stop to point out in detail how many different meanings have been given to these phrases—the law of nature and the law of morals. Hardly any two writers speak of them in the same sense. No doubt appeals to both are to be found scattered loosely here and there in the opinions of continental writers.

Let us examine them.

What is the law of nature?

Moralists tell us that for the individual man life is a struggle to overcome nature, and in early and, what we call natural or barbarous states of society, the arbitrary rule of force and not of abstract right or justice is the first to assert itself. In truth the initial difficulty is to fix what is meant by the law of nature. Gaius speaks of it as being the same thing as the *Jus Gentium* of the Romans, which, I need not remind you, is not the same thing as *Jus inter Gentes*. Ulpian speaks of the *Jus naturale* as that in which men and animals agree. Grotius uses the term as equivalent to the *Jus stricte dictum*, to be completed in the action of a good man or state by a higher morality, but suggesting the standard to which law ought to conform. Pufendorf in effect treats his view of the rules of abstract propriety, resting merely on unauthorized speculations, as constituting International Law, and acquiring no additional authority from the usage of nations; so that he cuts off much of what Grotius regards as law. Ortolan, in his *Diplomatie de la Mer*, cites with approval the following incisive passage from Bentham, speaking of so-called natural rights springing from so-called natural law:—

‘Natural right is often employed in a sense opposed to law, as when it is said, for example, that law cannot be opposed to natural right, the word “right” is employed in a sense superior to law; a right is recognized which attacks law, upsets and annuls it. In this sense, which is antagonistic to law, the word “droit” is the greatest enemy of reason and the most terrible destroyer of governments.

‘We cannot reason with fanatics armed with a natural right, which each one understands as he pleases, applies as it suits him, of which he will yield nothing, withdraw nothing, which is inflexible, at the same time that it is unintelligible, which is consecrated

in his eyes like a dogma, and which he cannot discard without a cry. Instead of examining laws by their results, instead of judging them to be good or bad, they consider them with regard to their relation to this so-called natural right. That is to say, they substitute for the reason of experience all the chimeras of their own imagination.'

Austin, also, in his work on Jurisprudence, already mentioned, and referring to Pufendorf and others of his school, says :—

'They have confounded positive international morality or the rules which actually obtain amongst civilized nations in their mutual intercourse, with their own vague conceptions of international morality as it ought to be, with that indeterminate something which they call the law of nature. Professor von Martens of Göttingen is actually the first of the writers on the law of nations who seized this distinction with a firm grasp: the first who has distinguished the rules which ought to be received in the intercourse of nations, or, which would be received if they conformed to an assumed standard of whatever kind, from those which *are* so received, endeavoured to collect from the practice of civilized communities what are the rules actually recognized and acted upon by them, and gave to these rules the name of positive international law.'

Finally Woolsey, speaking of this class of writers, says they commit the fault of failing to distinguish sufficiently between natural justice and the law of nations, of spinning the web of a system out of their own brain as if they were the legislators of the world, and of neglecting to inform us what the world actually holds the law to be by which nations regulate their conduct. So much for the law of nature.

What are we to say of the appeal to the law of morality?

It cannot be affirmed that there is a universally accepted standard of morality. Then what is to be the standard? The standard of what nation? The standard of what nation and in what age?

Human society is progressive—progressive let us hope to a higher, a purer, a more unselfish ethical standard. The Mosaic law enjoined the principle an eye for an eye, a tooth for a tooth. The Christian law enjoins that we love our enemies and that we do good to those who hate us. But more. Nations although progressing, let us believe, in the sense which I have indicated, do not progress *pari passu*. One instance occurs to me pertinent to the subject in hand.

Take the case of privateering. The United States is to-day the only great power which has not given its adhesion to the principle of the Declaration of Paris of 1856, for the abolition of

privateering. The other great nations of the earth have denounced privateering as immoral and as the cover and the fruitful occasion of piracy. I am not at all concerned to discuss in this connexion whether the United States were right or were wrong. It would not be pertinent to the point; but it is just to add that the assenting Powers had not scrupled to resort to privateering in past times, and also that the United States declared their willingness to abandon the practice if more complete immunity of private property in time of war were secured.

Nor do nations, even where they are agreed on the inhumanity and immorality of given practices, straightway proceed to condemn them as international crimes. Take as an example of this the Slave Trade. It is not too much to say that the civilized powers are abreast of one another in condemnation of the traffic in human beings as an unclean thing—abhorrent to all principles of humanity and morality, and yet they have not yet agreed to declare this offence against humanity and morality to be an offence against the law of nations. That it is not so has been affirmed by English and by American judges alike. Speaking of morality in connexion with International Law, Professor Westlake in his 'Principles of International Law' acutely observes that while the rules by which nations have agreed to regulate their conduct *inter se*, are alone properly to be considered International Law, these do not necessarily exhaust the ethical duties of states one to another, any more, indeed, than municipal law exhausts the ethical duties of man to man; and Dr. Whewell has remarked of jural laws in general that they are not (and perhaps it is not desirable that they should be) co-extensive with morality. He says the adjective *right* belongs to the domain of morality; the substantive *right* to the domain of law.

The truth is that civilized men have at all times been apt to recognize the existence of a law of morality, more or less vague and undefined, depending upon no human authority and supported by no human external sanction other than the approval and disapproval of their fellow-men, yet determining, largely, for all men and societies of men what is right and wrong in human conduct, and binding, as is sometimes said, *in foro conscientiae*. This law of morality is sometimes treated as synonymous with the natural law, but sometimes the natural law is regarded as having a wider sphere, including the whole law of morality. It cannot be said either of international law or of municipal law that they include the moral law, nor accurately or strictly that they are included within it. It is a truism to say that municipal law and international law ought not to offend against the law of morality.

They may adopt and incorporate particular precepts of the law of morality; and on the other hand, undoubtedly, that may be forbidden by the municipal or international law, which in itself is in no way contrary to the law of morality or of nature. But whilst the conception of the moral law or law of nature excludes all idea of dependence on human authority, it is of the essence of municipal law that its rules have been either enacted or in some way recognized as binding by the supreme authority of the state (whatever that authority may be), and so also is it of the essence of International Law that its rules have been recognized as binding by the nations constituting the community of civilized mankind.

We conclude then that, while the aim ought to be to raise high its ethical standard, International Law, as such, includes only so much of the law of morals or of right reason or of natural law (whatever these phrases may cover) as nations have agreed to regard as International Law.

In fine, International Law is but the sum of those rules which civilized mankind have agreed to hold as binding in the mutual relations of states. We do not, indeed, find all those rules recorded in clear language—there is no international code. We look for them in the long records of customary action; in settled precedents; in treaties affirming principles; in state documents; in declarations of nations in conclave—which draw to themselves the adhesion of other nations; in declarations of text-writers of authority generally accepted; and lastly, and with most precision, in the field which they cover, in the authoritative decisions of Prize Courts. I need hardly stop to point out the great work under the last head accomplished, amongst others, by Marshall and Story in these States, by Lord Stowell in England, and by Portalis in France.

From these sources we get the evidence which determines whether or not a particular canon of conduct, or a particular principle, has or has not received the express or implied assent of nations. But International Law is not as the twelve tables of ancient Rome. It is not a closed book. Mankind are not stationary. Gradual change and gradual growth of opinion are silently going on. Opinions, doctrines, usages, advocated by acute thinkers are making their way in the world of thought. They are not yet part of the law of nations. In truth, neither doctrines derived from what is called the law of nature (in any of its various meanings), nor philanthropic ideas, however just or humane, nor the opinion of text-writers, however eminent, nor the usages of individual states—none of these, nor all combined, constitute International Law.

If we depart from the solid ground I have indicated, we find ourselves amid the treacherous quicksands of metaphysical and ethical speculation: we are bewildered, particularly by the French writers in their love for *un système*, and perplexed by the obscure subtleties of writers like Hautefeuille with his *Loi primitive* and *Loi secondaire*. Indeed it may, in passing, be remarked that history records no case of a controversy between nations having been settled by abstract appeals to the laws of nature or of morals.

But while maintaining this position, I agree with Woolsey when he says that if International Law were not made up of rules for which reasons could be given, satisfactory to man's intellectual and moral nature, it would not deserve the name of a science. Happily those reasons can be given. Happily men and nations propose to themselves higher and still higher ethical standards. The ultimate aim in the actions of men and of communities ought, and I presume will be admitted, to be, to conform to the divine precept, 'Do unto others as you would that others should do unto you.'

I have said that the rules of International Law are not to be traced with the comparative distinctness with which municipal law may be ascertained—although even this is not always easy. I would not have it, however, understood that I should to-day advocate the codification of International Law. The attempt has been made, as you know, by Field in this country, and by Professor Bluntschli of Heidelberg, and by some Italian jurists, but has made little way towards success. Indeed, codification has a tendency to arrest progress. It has been so found, even where branches or heads of municipal law have been codified, and it will at once be seen how much less favourable a field for such an enterprise International Law presents, where so many questions are still indeterminate. After all it is to be remembered that jural law, in its widest sense, is as old as Society itself: *ubi societas ibi jus est*; but International Law, as we know it, is a modern invention. It is in a state of growth and transition. To codify it would be to crystallize it: uncoded it is more flexible and more easily assimilates new rules. While agreeing, therefore, that indeterminate points should be determined, and that we should aim at raising the ethical standard, I do not think we have yet reached the point at which codification is practicable, or if practicable would be a public good.

Let me give you an analogy. Amongst the most successful experiments in codification in English communities, have been those in Anglo-India, particularly the Penal Code and the Codes of Criminal and Civil Procedure. Prompted by their comparative

success, Sir Roland Wilson urged the extension of the process of codification to those traditional unwritten native usages, or customary law, of Hindu or Mahomedan origin, still recognized in the government of India by Englishmen. But the wiser opinion of Indian experts was that it was better not to persevere in the attempt. Many of these usages, by sheer force of contact with European life and habits of thought, are falling into desuetude. The hand of change is at work upon them, and to codify them would be to stop the natural progress of disintegration.

As we are not to-day considering the history of International Law, I shall say but a word as to its rise, and then pass on to the consideration of its later developments and tendencies.

Like all law, in the history of human societies, it begins with usage and custom, and unlike municipal law, it ends there. When, after the break-up of the Roman Empire, the surface of Europe was partitioned and fell under the rule of different sovereigns, the need was speedily felt for some guiding rule of international conduct. International Law was in a rudimentary stage; it spoke with ambiguous voice; it failed to cover the whole ground of doubtful action. It needed not only an interpreter of authority, but one who should play at once the part of mediator, arbiter and judge. The Christian religion has done much to soften and humanize the action of men and of nations, and the Papal head of Christendom became, after the disruption of the Roman Empire, the interpreter and almost the embodiment of International Law. The popes of the middle ages determined many a hot dispute between rival forces without loss of human life. Their decrees were widely accepted. Their action, however, at the best, could not adequately supply the place of a rule of conduct to which all might indifferently appeal. And when, later, with the Reformation movement, the time came when the pope could not command recognition as the religious head of a united Christendom, the necessity of the time quickened men's brains, and, under the fostering care of the jurists of many lands, there began to emerge a system which gave shape and form to ideas generally received and largely acted on by nations.

What Sir James Stephen has eloquently said of religion may truly be predicated of International Law. The jurists set to music the tune which was haunting millions of ears. It was caught up, here and there, and repeated till the chorus was thundered out by a body of singers able to drown all discords, and to force the vast unmusical mass to listen to them.

Although Hugo de Groote is regarded as the father and founder of International Law, he was preceded by two men born into the

world forty years before him, namely, Ayala (the Spanish Judge-Advocate with the army of the Prince of Parma) and Suarez (a Jesuit priest, also a Spaniard), both born in 1548, whose labours ought not to be forgotten.

Suarez in his *De Legibus et Deo Legislatore*, and Ayala in his *De Jure et Officiis Bellicis et Disciplina Militari* had done good work.

Suarez, from the point of view of the Catholic theologian, assumes that the principles of the moral law are capable of complete and authoritative definition, and are supported by the highest spiritual sanction. He therefore treats of the *Lex Naturalis* as a definite substantive law, sufficient and complete in its own sphere and binding on all men. But he regards International Law as a code of rules dealing with matters outside the sphere of the natural law:—matters not strictly right or wrong in themselves, but becoming so only by virtue of the precepts of the law which he considers to be founded upon the generally recognized usages of nations. In the following passage, which is interesting from the singular modernness of its spirit, he explains his view of the origin of International Law:—

‘The foundation of the law of nations lies in this, that the human race, though divided into various peoples and kingdoms, has always a certain unity, which is not merely the unity of species, but is also political and moral; as is shown by the natural precept of mutual love and pity, which extends to all peoples, however foreign they may be to one another, and whatever may be their character or constitution. From which it follows that although any state, whether a republic or a kingdom, may be a community complete in itself, it is nevertheless a member of that whole which constitutes the human race; for such a community is never so completely self-sufficing but that it requires some mutual help and intercourse with others, sometimes for the sake of some benefit to be obtained, but sometimes too, from the moral necessity and craving which are apparent from the very habits of mankind.

‘On this account, therefore, a law is required by which states may be rightly directed and regulated in this kind of intercourse with one another. And although to a great extent this may be supplied by the natural law, still not adequately nor directly, and so it has come about that the usages of states have themselves led to the establishment of special rules. For, just as within an individual state custom gives rise to law, so, for the human race as a whole, usages have led to the growth of the laws of nations; and this the more easily, inasmuch as the matters with which such law deals are few and are closely connected with the law of nature from which they may be deduced by inferences, which though not strictly necessary, so as to constitute laws of absolute moral obliga-

tion, still are very conformable and agreeable to nature, and therefore readily accepted by all.'

Nor ought we to overlook the work of a writer even earlier than these. I mean Franciscus à Victoria. Hall says of him that his writings in 1533 mark an era in the history of International ethics. Spain claimed, largely by virtue of papal grant and warrant, to acquire the territory and the mastery of the semi-civilized races of America. He denied the validity of the papal title; he maintained the sovereign rights of the aboriginal races, and he claimed to place international relations upon the basis of equal rights as between communities in actual possession of independence. In other words, he, first, clearly affirmed the juridical principle of the complete international equality of independent states, however disproportionate their power.

Grotius undoubtedly had had the field of international relations explored by these, amongst other writers, who had preceded him, but to him is certainly due the credit of evolving in his *De Jure Belli ac Pacis* a coherent system of law for the aggregation of states.

But I turn from this interesting line of thought, to consider, first, the part played by the United States in shaping the modern tendencies of International Law, and, next, whither those tendencies run. I have already spoken of the International writers of whom you are justly proud. It is not too much to say that the undoubted stream of tendency in modern International Law to mitigate the horrors of war, to humanize or to make less inhuman its methods, and to narrow the area of its consequential evils, is largely due to the policy of your statesmen, and the moral influence of your jurists.

The reason why you thus early in your young history as an independent power took so leading and noble a part in the domain of International Law is not far to seek;—it is at once obvious and interesting.

In the first place, you were born late, in the life of the world, into the family of nations. The common law of England you had indeed imported and adopted as colonists in the Eastern States, but subject as you then were to the mother country, you had no direct interest or voice in international relations, which were entirely within the domain of the Sovereign power. But when you asserted your independence, the laws of the family of nations, of which you then became a member, were bound up with and became in part the justification for your existence as a sovereign power, and assumed for you importance and pre-eminence beyond the common



law itself. Further, your remoteness from the conflicts of European powers and the wisdom of your rulers in devoting their energies to the consolidation and development of home-affairs, gave to your people a special concern in that side of International Law which affects the interests, rights and obligations of neutrals; and thus, it has come to pass that your writers have left their enduring mark on the law of nations touching allegiance, nationality, naturalization and neutrality, although as to these there are points which still remain indeterminate.

It is substantially true to say that while to earlier writers is mainly due the formulation of rules relating to a state of war, to the United States—to its judges, writers and statesmen, we largely owe the existing rules which relate to a state of peace, and which affect the rights and obligations of powers, which, during a state of war, are themselves at peace.

On the other hand, while in Great Britain, writers of great distinction on International Law are not wanting, and while the judges of her Prize Courts have done a great work in systematizing and justifying on sound principles the law of capture and prize, it is true to say that British lawyers did not apply themselves, early, or with great zeal, to the consideration of International Jurisprudence.

Nor, again, is the reason far to seek. Great Britain had existed for centuries before International Law, in the modern sense, came into being. The main body of the English Law was complete. The common law, springing from many sources, had assumed definite and comprehensive proportions. It sufficed for the needs of the time. Neither English statesmen nor English lawyers experienced the necessity which was strongly felt on the Continent of Europe—the constant theatre of war—for the authorized formulation of rules of international conduct.

The need for these was slowly forced upon England, and, it is hardly too much to say that, to the British Admiral, accustomed to lord it on the high seas, International Law at first came, not as a blessing and an aid, but as a perplexing embarrassment.

Notwithstanding all this, there is a marked agreement between English and American writers as to the manner in which International Law is treated. They belong to the same school—a school distinctly different from that of writers on the Continent of Europe. The essential difference consists in this:—whereas in the latter, what I shall call the ethical and metaphysical treatment is followed, in the former, while not ignoring the important part which ethics play in the consideration of what International Law ought to be, its writers for the most part carefully distinguish between what is,

in fact, International Law from their views of what the law ought to be. Their treatment is mainly historical.

By most continental writers, and by none more than Hautefeuille, what is, and what he thinks ought to be law, theory and fact, law and so-called rules of nature and of right, are mixed up in a way at once confusing and misleading.

One distinguished English writer indeed, the late Sir Henry Maine, thought that he had discovered a fundamental difference between English and American jurists as to the view taken of the obligation of International Law.

His opinion was based on the judgments of the English judges in the celebrated *Franconia* case, in which it was held that the English Courts had no jurisdiction to try a foreigner for a crime committed on the high seas but within a marine league from the British coast. The case was decided in 1876 and is reported in the second volume of the Law Reports, Exchequer Division, p. 63. The facts were these :— The defendant was Captain Keyn, a German subject, in charge as Captain of the German Steamship *Franconia*. When off Dover the *Franconia*, at a point within two and a half miles of the beach, ran into and sank a British steamer, *Strathclyde*, thereby causing loss of life. The facts were such as to constitute, according to English law, the crime of manslaughter, of which the defendant was found guilty by the jury, but the learned judge who tried the case at the Central Criminal Court reserved, for further consideration by the Court for Crown Cases Reserved, the question whether the Central Criminal Court had jurisdiction over the defendant, a foreigner, in respect of an offence committed by him on the high seas, but within a marine league of the shore. All the members of the Court were of opinion that the chief Criminal Courts, that is to say, the Courts of Assize and the Central Criminal Court, were clothed with jurisdiction to administer justice in the bodies of counties, or, in other words, in English territory; and that from the time of Henry the Eighth a Court of Special Commissioners, and, later, the Central Criminal Court (in which the defendant had been tried) had been invested by statute with the jurisdiction previously exercised by the Lord High Admiral on the high seas. But the majority held that the marine league belt was not part of the territory of England, and therefore not within the bodies of counties, and also that the Admiral had had no jurisdiction over foreigners on the high seas. The minority, on the other hand, held that the marine belt was part of the territory of England, and that the Admiral had had jurisdiction over foreigners within those limits.

While I do not say that I should have arrived at the conclusions

of historical fact of the majority, I am by no means clear that the judges of the United States, accepting the same data as did the majority of the English judges, would not have decided in the same way. But however this may be, the views of the majority do not seem to me to warrant the assumption of Sir Henry Maine that the case fundamentally affects the view taken of the authority of International Law.

What it does incidentally reveal is a constitutional difference between the United States and Great Britain as to the methods by which the Municipal Courts acquire, at least in certain cases, jurisdiction to try and to punish offences against International Law.

An example of that difference is ready to hand. Improved and stricter views of neutral duties constitute one of the great developments of this century.

These views were (for reasons to which I have already adverted) adopted earlier and more fully in the United States than in England. What was thereupon the action of the Executive? No sooner had Washington, as President, and Jefferson, as Secretary of State, promulgated the rules of neutrality by which they intended to be guided, than they caused Gideon Henfield, an American citizen, to be tried for taking service on board a French privateer, as being a criminal act, because in contravention of those rules. Political feeling procured an acquittal, in spite of the judge's direction.

Later, no doubt, Congress passed the Act of 1794, making such conduct criminal, not (as I gather), because it was admitted to be necessary, but simply to strengthen the hands of the Executive.

I can hardly doubt how the same case would have been dealt with in England.

Assuming the doing of the acts forbidden by proclamation of neutrality, although infractions of International Law, not to be misdemeanours by common law, and not to have been made offences by municipal statute, the judges (I cannot doubt) would have said the act was yesterday legal, or at least not illegal, and that, municipal law not having declared it a crime, they could not so declare it. According to the law of England a proclamation by the Executive, in however solemn form, has no legislative force unless an Act of Parliament has so enacted. Parliament has in fact so enacted as to Orders of the Queen in Council in many cases. But assuming the law to be as I have stated, it points to no failure in England to recognize the full obligation of International Law as between states. For, notwithstanding isolated expressions of opinion uttered in times of excitement, it will not to-day be doubted that it is the duty of states to give effect to the obligations of

International Law by municipal legislation, where that is necessary, and to use reasonable efforts to secure the observance of that law.

In England we have an old Constitution under which we are accustomed to fixed modes of legislation, and when at last we accept a new development of International Law, we look to those methods to give effect to it. Indeed, that habit of looking to legislation to meet new needs and developments, even in internal concerns, a habit confirmed and strengthened in the current century, has done much to restrain the judges from that bold expansion of principle to meet new cases, which, when legislation was less active, marked judicial utterances.

On the other hand, with you things are materially different. Your Constitution is still so modern that equally fixed habits of looking to legislation have not had time to grow up. Meanwhile, that modern Constitution is from time to time assailed by still more modern necessities, and the methods for its amendment are not swift or easy. The structure has not become completely ossified. Hence has arisen what I may call a flexibility of interpretation, applied to the Constitution of the United States, for which I know no parallel in English judicature, and which seems to me to exceed the latitude of interpretation observed by your judges in relation to Acts of Congress. I refer, as examples, to the emancipation of the slaves by President Lincoln during the Civil War, which was justified as an act covered by the necessities of the case and within the 'war power' conferred on the Executive by the Constitution; and, also, to the judicial declaration by the Supreme Court, of the validity of the Act of Congress making Greenbacks legal tender, on the ground that certain express powers, as to currency, being vested in Congress by the Constitution, the power of giving forced circulation to paper flowed from them as a desirable, if not a necessary, implication. With us no such difficulties arise. Our Constitution is unwritten, and the Legislature is omnipotent. With you the Constitution is written, and the judicial power interprets it, and may declare the highest Act of Congress null and void as unconstitutional. With us there can, in the strict sense of the words, be no such thing as an unconstitutional Act of Parliament.

I turn now to the consideration of what characterizes the later tendencies of International Law. In a word it is their greater humanity.

When Menelik, Emperor of Abyssinia, was recently reported to have cut off the right arms and feet of 500 prisoners, the civilized world felt a thrill of horror. Yet the time was when to treat prisoners as slaves and permanently to disable them from again

bearing arms, were regarded as common incidents of belligerent capture. Such acts would once have excited no more indignation than did the inhumanities of the African slave trade before the days of Clarkson and Wilberforce.

Let us hope that it is no longer possible to do as Louis XIV did in his devastation of the Palatinate, or to do as he threatened to do—break down the dykes and overwhelm with disaster the Low Countries. Let us hope, too, that no modern Napoleon would dare to decree as the first Napoleon did in his famous or infamous *seront brûlées* edict of 1810. The force of public opinion is too strong and it has reached a higher moral plane.

A bare recital of some of the important respects in which the evils of war have been mitigated by more humane customs must suffice.

Amongst them are : (1) the greater immunity from attack of the persons and property of enemy-subjects in a hostile country ; (2) the restrictions imposed on the active operations of a belligerent when occupying an enemy's country ; (3) the recognized distinction between subjects of the enemy, combatant and non-combatant ; (4) the deference accorded to cartels, safe conducts and flags of truce ; (5) the protection secured for ambulances and hospitals and for all engaged in tending the sick and wounded—of which the Geneva Red Cross Convention of 1864 is a notable illustration ; (6) the condemnation of the use of instruments of warfare which cause needless suffering.

In this field of humane work the United States took a prominent part. When the Civil War broke out President Lincoln was prompt in entrusting to Professor Franz Lieber the duty of preparing a manual of systematized rules for the conduct of forces in the field—rules aimed at the prevention of those scenes of cruelty and rapine which were formerly a disgrace to humanity. That manual has, I believe, been utilized by the Governments of England, France and Germany.

Even more important are the changes wrought in the position of neutrals in war times ; who, while bound by strict obligations of neutrality, are in great measure left free and unrestricted in the pursuit of peaceful trade.

But in spite of all this who can say that these times breathe the spirit of peace ? There is war in the air. Nations armed to the teeth prate of peace ; but there is no sense of peace. One sovereign burthens the industry of his people to maintain military and naval armament at war strength, and his neighbour does the like and justifies it by the example of the other ; and England, insular though she be, with her Imperial interests scattered the world over,

follows, or is forced to follow, in the wake. If there be no war, there is at best an armed peace.

Figures are appalling. I take those for 1895. In Austria the annual cost of Army and Navy was, in round figures, £18,000,000 sterling; in France, £37,000,000; in Germany, £27,000,000; in Great Britain, £36,000,000; in Italy, £13,000,000; and in Russia, £52,000,000.

The significance of these figures is increased if we compare them with those of former times. The normal cost of the armaments of war has of late years enormously increased. The annual interest on the public debt of the Great Powers is a war tax. Behind this array of facts stands a tragic figure. It tells a dismal tale. It speaks of over-burthened industries, of a waste of human energy unprofitably engaged, of the squandering of treasure which might have let light into many lives, of homes made desolate, and all this, too often, without recompense in the thought that these sacrifices have been made for the love of country or to preserve national honour, or for national safety. When will governments learn the lesson that wisdom and justice in policy are a stronger security than weight of armament?

‘Ah! when shall all men’s good  
Be each man’s rule, and universal peace  
Lie, like a shaft of light, across the land?’

It is no wonder that men—earnest men—enthusiasts if you like, impressed with the evils of war, have dreamt the dream that the millennium of peace might be reached by establishing a universal system of international arbitration.

The cry for peace is an old-world cry. It has echoed through all the ages, and arbitration has long been regarded as the hand-maiden of peace. Arbitration has, indeed, a venerable history of its own. According to Thucydides, the historian of the Peloponnesian War, Archidamus, King of Sparta, declared that ‘it was unlawful to attack an enemy who offered to answer for his acts before a tribunal of arbiters.’

The fifty years’ treaty of alliance between Argos and Lacedaemon contained a clause to the effect that if any difference should arise between the contracting parties, they should have recourse to the arbitration of a neutral power, in accordance with the custom of their ancestors. These views of enlightened Paganism have been reinforced in Christian times. The Roman Emperors for a time, and afterwards in fuller measure the Popes (as we have seen), by their arbitrament often preserved the peace of the old world, and prevented the sacrifice of blood and treasure. But from time to time, and more fiercely when the influence of the head of

Christendom lessened, the passions of men broke out, the lust for dominion asserted itself, and many parts of Europe became so many fields of Golgotha. In our own times the desire has spread and grown strong for peaceful methods for the settlement of international disputes. The reason lies on the surface. Men and nations are more enlightened; the grievous burthen of military armaments is sorely felt; and in these days when, broadly speaking, the people are enthroned, their views find free and forcible expression in a world-wide Press. The movement has been taken up by societies of thoughtful and learned men in many places. The *Bureau International de la Paix* records the fact that some ninety-four voluntary Peace Associations exist, of which some forty are in Europe, and fifty-four in America. Several Congresses have been held in Europe to enforce the same object, and in 1873 there was established at Ghent the *Institut du Droit International*, the declared object of which is to put International Law on a scientific footing, to discuss and clear up moot points, and to substitute a system of rules conformable to right for the blind chances of force and the lavish expenditure of human life.

In 1873 also the Association for the Reform and Codification of the Law of Nations was formed, and it is to-day pursuing active propaganda under the name of the International Law Association, which it adopted in 1894. • It also has published a report affirming the need of a system of international arbitration.

In 1888 a Congress of Spanish and American Jurists was held at Lisbon, at which it was resolved that it was indispensable that a tribunal of arbitration should be constituted with a view to avoid the necessity of war between nations.

But more hopeful still, the movement has spread to legislative representative bodies. As far back as 1833 the Senate of Massachusetts proclaimed the necessity for some peaceful means of reconciling international differences, and affirmed the expediency of establishing a court of nations.

In 1890 the Senate and House of Representatives of the United States adopted a concurrent resolution, requesting the President to make use of any fit occasion to enter into negotiations with other Governments, to the end that any difference or dispute, which could not be adjusted by diplomatic agency, might be referred to arbitration, and peacefully adjusted by such means.

The British House of Commons in 1893 responded by passing unanimously a resolution expressive of the satisfaction it felt with the action of Congress, and of the hope that the Government of the Queen would lend its ready co-operation to give effect to it. President Cleveland officially communicated this last resolution to

Congress, and expressed his gratification that the sentiments of two great and kindred nations were thus authoritatively manifested in favour of the national and peaceable settlement of international quarrels by recourse to honourable arbitration. The Parliaments of Denmark, Norway and Switzerland, and the French Chamber of Deputies have followed suit.

It seemed eminently desirable that there should be some agency, by which members of the great representative and legislative bodies of the world, interested in this far-reaching question, should meet on a common ground and discuss the basis for common action.

With this object there has recently been founded 'The Permanent Parliamentary Committee in favour of Arbitration and Peace,' or, as it is sometimes called, 'The Inter-Parliamentary Union.' This Union has a permanent organization—its office is at Berne. Its members are not vain idealists. They are men of the world. They do not claim to be regenerators of mankind, nor do they promise the millennium, but they are doing honest and useful work in making straighter and less difficult the path of intelligent progress. Their first formal meeting was held in Paris in 1889 under the Presidency of the late M. Jules Simon; their second in 1890 in London under the Presidency of Lord Herschell, ex-Lord Chancellor of Great Britain; their third in 1891 at Rome under the Presidency of Signor Bianchieri; their fourth in 1892 at Berne under the Presidency of M. Droz; their fifth in 1894 at the Hague under the Presidency of M. Rohnsen; their sixth in 1895 at Brussels under the Presidency of M. Descamps; and their seventh will, it is arranged, be held this year at Buda-Pest. Speaking in this place I need only refer, in passing, to the remarkable Pan-American Congress held in your States in 1890 at the instance of the late Mr. Blaine, directed to the same peaceful object.

It is obvious, therefore, that the sentiment for peace and in favour of arbitration as the alternative for war is growing apace. How has that sentiment told on the direct action of nations? How far have they shaped their policy according to its methods? The answers to these questions are also hopeful and encouraging.

Experience has shown that, over a large area, international differences may honourably, practically, and usefully be dealt with by peaceful arbitrament. There have been since 1815 some sixty instances of effective International Arbitration. To thirty-two of these the United States have been a party, and Great Britain to some twenty of them.

There are many instances also of the introduction of arbitration clauses into treaties. Here again the United States appear in the



van. Amongst the first of such treaties—if not the very first—is the Guadalupe-Hidalgo Treaty of 1848 between America and Mexico. Since that date many other countries have followed this example. In the year 1873 Signor Mancini recommended that, in all treaties to which Italy was a party, such a clause should be introduced. Since the Treaty of Washington, such clauses have been constantly inserted in Commercial, Postal, and Consular Conventions. They are to be found also in the delimitation treaties of Portugal with Great Britain and with the Congo Free State made in 1891. In 1895 the Belgian Senate, in a single day, approved of four treaties with similar clauses, namely, treaties concluded with Denmark, Greece, Norway, and Sweden.

There remains to be mentioned a class of treaties in which the principle of arbitration has obtained a still wider acceptance. The treaties of 1888 between Switzerland and San Salvador, of 1888 between Switzerland and Ecuador, of 1888 between Switzerland and the French Republic, and of 1894 between Spain and Honduras, respectively contain an agreement to refer all questions in difference, without exception, to arbitration. Belgium has similar treaties with Venezuela, with the Orange Free State, and with Hawaii.

These facts, dull as is the recital of them, are full of interest and hope for the future.

But are we thence to conclude that the millennium of peace has arrived—that the dove has returned to the ark, sure sign that the waters of international strife have permanently subsided?

I am not sanguine enough to lay this flattering unction to my soul. Unbridled ambition—thirst for wide dominion—pride of power still hold sway, although I believe with lessened force and in some sort under the restraint of the healthier opinion of the world.

But further, friend as I am of peace, I would yet affirm that there may be even greater calamities than war—the dishonour of a nation, the triumph of an unrighteous cause, the perpetuation of hopeless and debasing tyranny:

‘War is honourable

In those who do their native rights maintain,  
In those whose swords an iron barrier are  
Between the lawless spoiler and the weak;  
But is, in those who draw th’ offensive blade  
For added power or gain, sordid and despicable.’

It behoves, then, all who are friends of peace and advocates of arbitration, to recognize the difficulties of the question, to examine and meet these difficulties, and to discriminate between the cases

in which friendly arbitration is, and in which it may not be, practically, possible.

Pursuing this line of thought, the shortcomings of International Law reveal themselves to us and demonstrate the grave difficulties of the position.

The analogy between arbitration as to matters in difference between individuals, and to matters in difference between nations, carries us but a short way.

In private litigation the agreement to refer is either enforceable as a rule of Court, or, where this is not so, the award gives to the successful litigant a substantive cause of action. In either case there is behind the arbitrator the power of the judge to decree, and the power of the Executive to compel compliance with, the behest of the arbitrator. There exist elaborate rules of Court and provisions of the Legislature governing the practice of arbitrations. In fine, such arbitration is a mode of litigation by consent, governed by law, starting from familiar rules, and carrying the full sanction of judicial decision. International arbitration has none of these characteristics. It is a cardinal principle of the law of nations that each sovereign power, however politically weak, is internationally equal to any other political power, however politically strong. There are no rules of International Law relating to arbitration, and of the law itself there is no authoritative exponent, nor any recognized authority for its enforcement.

But there are differences to which, even as between individuals, arbitration is inapplicable—subjects which find their counterpart in the affairs of nations. Men do not arbitrate where character is at stake, nor will any self-respecting nation readily arbitrate on questions touching its national independence or affecting its honour.

Again, a nation may agree to arbitrate and then repudiate its agreement. Who is to coerce it? Or, having gone to arbitration and been worsted, it may decline to be bound by the award. Who is to compel it?

These considerations seem to me to justify two conclusions:—The first is that arbitration will not cover the whole field of international controversy, and the second that unless and until the great powers of the world, in league, bind themselves to coerce a recalcitrant member of the family of nations, we have still to face the more than possible disregard by powerful states of the obligations of good faith and of justice. The scheme of such a combination has been advocated, but the signs of its accomplishment are absent. We have, as yet, no league of nations of the Amphictyonic type.

Are we then to conclude that force is still the only power that

rules the world? Must we then say that the sphere of arbitration is a narrow and contracted one?

By no means. The sanctions which restrain the wrongdoer—the breaker of public faith—the disturber of the peace of the world, are not weak, and, year by year, they wax stronger. They are the dread of war, and the reprobation of mankind. Public opinion is a force which makes itself felt in every corner and cranny of the world, and is most powerful in the communities most civilized. In the public Press, and in the Telegraph, it possesses agents by which its power is concentrated, and speedily brought to bear where there is any public wrong to be exposed and reprobated. It year by year gathers strength as general enlightenment extends its empire, and a higher moral altitude is attained by mankind. It has no ships of war upon the seas or armies in the field, and yet great potentates tremble before it, and humbly bow to its rule.

Again, trade and travel are great pacificators. The more nations know of one another, the more trade relations are established between them, the more goodwill and mutual interest grow up; and these are powerful agents working for peace.

But although I have indicated certain classes of questions on which sovereign powers may be unwilling to arbitrate, I am glad to think that these are not the questions which most commonly lead to war. It is hardly too much to say that arbitration may fitly be applied in the case of by far the largest number of questions which lead to international differences. Broadly stated, (1) wherever the right in dispute will be determined by the ascertainment of the true facts of the case; (2) where, the facts being ascertained, the right depends on the application of the proper principles of International Law to the given facts, and (3) where the dispute is one which may properly be adjusted on a give and take principle with due provision for equitable compensation as in cases of delimitation of territory and the like: in all such cases, the matter is one which ought to be arbitrated, and can be satisfactorily dealt with by arbitration.

The question next arises, What ought to be the constitution of the tribunal of arbitration? Is it to be a tribunal *ad hoc*, or is it to be a permanent international tribunal?

It may be enough to say, that at this stage, the question of the constitution of a permanent tribunal is not ripe for practical discussion, nor will it be until the majority of the great powers have given in their adhesion to the principle. But whatever may be said for vesting the authority in such powers to select the arbitrators, from time to time, as occasion may arise, I doubt whether in any case a permanent tribunal, the members of which

shall be *a priori* designated, is practicable or desirable. In the first place the character of the best tribunal must largely depend upon the question to be arbitrated. But apart from this, I gravely doubt the wisdom of giving that character of permanence to the *personnel* of any such tribunal. The interests involved are commonly so enormous and the forces of national sympathy, pride and prejudice, are so searching, so great and so subtle, that I doubt whether a tribunal, the membership of which had a character of permanence, even if solely composed of men accustomed to exercise the judicial faculty, would long retain general confidence, and, I fear, it might gradually assume intolerable pretensions.

There is danger, too, to be guarded against from another quarter. So long as war remains the sole court wherein to try international quarrels, the risks of failure are so tremendous, and, the mere rumour of war so paralyzes commercial and industrial life, that pretensions wholly unfounded will rarely be advanced by any nation, and the strenuous efforts of statesmen, whether immediately concerned or not, will be directed to prevent war. But if there be a standing court of nations, to which any power may resort, with little cost and no risk, the temptation may be strong to put forward pretensions and unfounded claims, in support of which there may readily be found, in most countries (can we except even Great Britain and the United States?) busybody Jingoism only too ready to air their spurious and inflammatory patriotism.

There is one influence which by the law of nations may be legitimately exercised by the powers in the interest of peace—I mean Mediation.

The Plenipotentiaries assembled at the Congress of Paris, 1856, recorded the following admirable sentiments in their twenty-third protocol:—‘The Plenipotentiaries do not hesitate to express, in the names of their governments, the wish that states between which any serious misunderstanding may arise should, before appealing to arms, have recourse as far as circumstances may allow to the good offices of a friendly power. The Plenipotentiaries hope that the governments not represented at the Congress will unite in the sentiment which has inspired the wish recorded in the present protocol.’

In the treaty which they concluded they embodied, but with a more limited application, the principle of mediation, more formal than that of good offices, though substantially similar to it. In case of a misunderstanding between the Porte and any of the signatory powers, the obligation was undertaken ‘before having recourse to the use of force, to afford the other contracting parties

the opportunity of preventing such an extremity by means of their mediation' (Article 8). Under this article Turkey, in 1877, appealed to the other powers to mediate between her and Russia. It is not, perhaps, to be wondered at, considering the circumstances, that the appeal did not succeed in preventing the Russo-Turkish war. But the powers assembled in the African Conference at Berlin were not discouraged from repeating the praiseworthy attempt, and in the final act of that Conference the following proviso (Article 12) appears:—

'In case of a serious disagreement arising between the signatory powers on any subjects within the limits of the territory mentioned in Article 1 and placed under the *régime* of commercial freedom, the powers mutually agree, before appealing to arms, to have recourse to the mediation of one or more of the neutral powers.'

It is to be noted that this provision contemplates not arbitration but mediation, which is a different thing. The mediator is not, at least in the first instance, invested, and does not seek to be invested, with authority to adjudicate upon the matter in difference. He is the friend of both parties. He seeks to bring them together. He avoids a tone of dictation to either. He is careful to avoid, as to each of them, anything which may wound their political dignity or their susceptibilities. If he cannot compose the quarrel, he may at least narrow its area and probably reduce it to more limited dimensions, the result of mutual concessions; and having narrowed the issues, he may pave the way for a final settlement by a reference to arbitration or by some other method.

This is a power often used—perhaps not so often as it ought to be—and with good results.

It is obvious that it requires tact and judgment, as to mode, time and circumstance, and that the task can be undertaken hopefully, only where the mediator possesses great moral influence, and where he is beyond the suspicion of any motive except desire for peace and the public good.

There is perhaps no class of question in which mediation may not, time and occasion being wisely chosen, be usefully employed, even in delicate questions affecting national honour and sentiment.

Mr. President, I come to an end. I have but touched the fringe of a great subject. No one can doubt that sound and well-defined rules of International Law conduce to the progress of civilization and help to ensure the peace of the world.

In dealing with the subject of arbitration, I have thought it right to sound a note of caution, but it would, indeed, be a reproach to our nineteen centuries of Christian civilization, if there were now no

better method, for settling international differences, than the cruel and debasing methods of war. May we not hope that the people of these States and the people of the Mother Land—kindred peoples—may, in this matter, set an example, of lasting influence, to the world? They are blood relations. They are indeed separate and independent peoples, but neither regards the other as a foreign nation.

We boast of our advance and often look back with pitying contempt on the ways and manners of generations gone by. Are we ourselves without reproach? Has our civilization borne the true marks? Must it not be said, as has been said of religion itself, that countless crimes have been committed in its name? Probably it was inevitable that the weaker races should, in the end, succumb, but have we always treated them with consideration and with justice? Has not civilization too often been presented to them at the point of the bayonet and the Bible by the hand of the filibuster? And apart from races we deem barbarous, is not the passion for dominion and wealth and power accountable for the worst chapters of cruelty and oppression written in the world's history? Few peoples—perhaps none—are free from this reproach. What indeed is true civilization? By its fruit you shall know it. It is not dominion, wealth, material luxury; nay, not even a great literature and education wide spread—good though these things be. Civilization is not a veneer; it must penetrate to the very heart and core of societies of men.

Its true signs are thought for the poor and suffering, chivalrous regard and respect for woman, the frank recognition of human brotherhood, irrespective of race or colour or nation or religion, the narrowing of the domain of mere force as a governing factor in the world, the love of ordered freedom, abhorrence of what is mean and cruel and vile, ceaseless devotion to the claims of justice. Civilization in that, its true, its highest sense, must make for peace. We have solid grounds for faith in the future. Government is becoming more and more, but in no narrow class sense, government of the people, by the people, and for the people. Populations are no longer moved and manœuvred as the arbitrary will or restless ambition or caprice of kings or potentates may dictate. And although democracy is subject to violent gusts of passion and prejudice, they are gusts only. The abiding sentiment of the masses is for peace—for peace to live industrious lives and to be at rest with all mankind. With the prophet of old they feel, though the feeling may find no articulate utterance: 'How beautiful upon the mountains are the feet of him that bringeth good tidings, that publisheth peace.'

Mr. President, I began by speaking of the two great divisions—American and British—of that English-speaking world which you and I represent to-day, and with one more reference to them I end.

Who can doubt the influence they possess for ensuring the healthy progress and the peace of mankind? But if this influence is to be fully felt, they must work together in cordial friendship, each people in its own sphere of action. If they have great power, they have also great responsibility. No cause they espouse can fail: no cause they oppose can triumph. The future is, in large part, theirs. They have the making of history in the times that are to come. The greatest calamity that could befall would be strife which should divide them.

Let us pray that this shall never be. Let us pray that they, always self-respecting, each in honour upholding its own flag, safeguarding its own heritage of right and respecting the rights of others, each in its own way fulfilling its high national destiny, shall yet work in harmony for the progress and the peace of the world.

RUSSELL OF KILLOWEN.

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THE USES OF LEGAL HISTORY <sup>1</sup>.

I FEEL much honoured by being permitted, although almost a complete stranger to you, to address the members of this Association at its nineteenth annual meeting. My theme, as you are aware, is 'The Uses of Legal History,' but I hasten to inform you that I am neither a professor of, nor an expert in, history of any sort, and that I do not, therefore, imagine for a moment that I shall be able to tell you anything new. The most I can expect to accomplish is to put before you old knowledge in a new light. Another reason, not personal to myself, why I am conscious of diffidence, is this. I am satisfied that in some of your States the standard of legal education is a very high one, higher, indeed, than in my own country. In addition to the legal classes held in your numerous colleges, you have, if I am not misinformed, no less than seventy-five law schools, of which sixty-eight are associated with universities. The reputation of at least one of these, the Harvard Law School, is well known throughout Europe. In Baltimore, I believe, a student may acquaint himself with the lower branches of jurisprudence at the University of Maryland, and afterwards pursue its higher branches at the Johns Hopkins University in the same city. These are solid testimonies to the thoroughness of your educational methods, and many more might be added to them.

In London, although it is the capital of an empire and a central seat of justice, no such advantages are to be had. We have, indeed, a Council of Legal Education, chosen by the four Inns of Court, which works conscientiously and well. But the limits assigned to it by the Inns do not admit of its doing much more than instil elementary knowledge, and that for the most part of a strictly business description. The only university London possesses is not a teaching university at all, but a mere examining board—a defect which has of late occupied the attention of many educational reformers and two Royal Commissions. The latter of these commissions reported two years ago in favour of making the so-called 'University of London' a teaching as well as an examining university, and to that end recommended the appointment of

<sup>1</sup> A paper read at the annual meeting of the American Bar Association held at Saratoga Springs, New York, on August 19, 20, 21, 1896.



a statutory commission armed with power to carry out a definite scheme of which they furnished an outline. I am happy to say that early in last July a bill was introduced into Parliament by the present government for the appointment of such a statutory commission. The state of business in the House of Commons during the session which closed last week necessitated the postponement of further progress with this measure until next year, but there is good ground for hoping that before long the singular anomaly, almost amounting to a scandal, that London should alone of all the great cities of the world be without a teaching university, will have been done away with.

The condition of our legal education being what I have described, it is not surprising that English lawyers, bred like myself amid the turmoil of the Courts, should be reproached by continental observers with knowing little about the science of law, or the relation which the English system of jurisprudence bears either to those that have preceded it, or to those that now prevail in other parts of the civilized globe. England, we are told, produces many first-rate advocates, occasionally very great judges, but rarely a scientific, or a comparative jurist. The imputation is, I am bound to admit, not wholly unfounded. With some of our judges and practitioners the very word 'jurist' is in bad odour. 'I will tell you what a jurist means,' said not long ago a distinguished member of our bench, prematurely, alas, taken away from our midst: 'A jurist is a man who knows a little of the law of every land except his own.' That the saying should have survived is *prima facie* evidence that our continental critics are right. It survived because it was thought to be witty, and there can be no real wit without a grain of truth, or at least what is deemed to be truth by those who regard it as wit.

So long as legal principles lie embedded in masses of reported cases, not always to be reconciled with one another, it is hopeless to expect that English law can be looked upon from the scientific point of view by those who pursue it professionally. A collector of herbs is not a true botanist, skilled though he may be in the knowledge of specific plants. Unless he understands how to classify them, unless he can tell us something of their native habitats and their family relationships, he is a collector and nothing more. So of most of our practising lawyers. They have at their fingers' ends a large number of authorities, which they manipulate, discuss, and apply, according to the exigencies of the hour; but case-knowledge is not scientific knowledge, any more than the particular is the general.

As is the common run of legal practitioners, so is the

common run of our legal text-books. We have in our libraries a number of monographs, dealing with the sub-heads of law in minute detail—books on torts and contracts, on settlements and wills, on purchases and sales, on specific performance, on negotiable instruments, and so forth. We have also many valuable compendia, or institutional treatises, dealing with the law as a whole. Each and all of these bear witness to the disjointed character of our jurisprudence. The numerous monographs overlap and jostle each other, like rudderless boats tossing at random on the surface of a wind-swept lake. The institutional treatises, in their endeavour to be exhaustive, fail in point of logical arrangement, as vessels overladen with a mixed cargo fail to get it properly stowed away in the hold. Some day, perhaps, we shall produce a *Corpus Juris* which will reduce this legal wilderness to order. But if we would lay bare the living forest we must first grub up the decayed trees. We have already digested with success portions of our civil law, notably that relating to Bills of Exchange, and a part of that relating to Partnership and Trusts. These experiments will doubtless be renewed from time to time until ultimately we shall get a civil code as complete as that which has just been promulgated in Germany. At present we have not even a criminal code such as you have in the State of New York and as is to be found in most continental countries, all that has been done in that direction being to pass five consolidating statutes dealing with larceny and a few other common offences.

But I am digressing at the very outset of the journey, and I must return to the main track.

To insist before an audience like this on the abstract value of legal history is, of course, wholly needless. I shall, therefore, assume that point and confine myself to illustrating it. Before proceeding further, however, I should like to say a word or two on the analogy between an inquiry into legal history and an inquiry into the origin of language. How, asks the scientific philologist, did language come to be at all? Was it a heaven-sent gift, born in an instant of some divine afflatus, or was it elaborated slowly and painfully from the rude articulation of reasoning beings? Which was the first language, or, if there was no first language, how many centres of language were there, and what were the processes of their several developments? A comparative review of different tongues in different ages can alone furnish the true answer. So, also, as regards jurisprudence. Whence, asks the legal historian, came the ideas which are now part and parcel of every system of law? What is the origin of property? What the early conception of contract? How far was

the right of testamentary disposition recognized by primitive societies? Whence came the notion of crime, as an offence against the State? Whence the idea of a corporation, as distinct from the individual members composing it? Questions these as deep and absorbing as the problems of primitive language, and, like them, only to be solved by recourse to the historical method.

Again, when we pass from the consideration of the origin of legal ideas to their process of development, language furnishes us with an analogy. The student of language does not confine himself to speculations on the origin of speech, or the canons of phonetic change, such as Grimm's law and the like. He loves to investigate the dialectic varieties of some particular language with which he is already familiar. He wants to know all about the different elements which compose it, and how much of it is derived from foreign sources. The better he succeeds in doing this, the more he enhances his own literary enjoyment. For language, thoroughly understood, is interesting as language, apart from the thoughts it clothes, and the prosiest prose or the tamest poetry may be redeemed from the commonplace by memories which the mere phraseology calls up.

A corresponding pleasure—I do not now speak of profit, I shall have a word to say on that, too, later on—may be derived from the study of early English law. With the aid of historical research, what at first sight seemed dead will kindle into life, and even old and withered forms of legal pleading will revive and blossom as the rose.

And here let me administer a caution to the novice as to the attitude of mind he should observe when he enters on the study of legal history. His attitude should be essentially a neutral one. He must shake himself free from all modern preconceptions. He must be prepared to throw himself into the remote past by an effort of imagination. He must realize, as intensely as he can, the scenes which the drama of humanity was then unfolding to the world—scenes on which the great stage-manager, Time, has long let the curtain fall.

Take, for example, the early history of contract. It is easy for all of us here present to see that the essence of a contract consists in the assent of two wills to the same subject-matter, and that the obligation to perform a promise is a thing binding in law, provided there is good or valuable consideration for it. Yet the conception of contract, as we thus know it, is of comparatively modern growth; powerful states having existed and flourished which paid very small attention to contract. The reason of this is an historical one. Contract, in its simplest form, implies the free

agency of two individuals. But in the patriarchal period of society, individuals were not free, were scarcely individuals at all as we now understand that word. The rules they obeyed were derived, first, from the station into which they were born, and next from the imperative commands addressed to them by the chief of the household of which they formed an integral part. This is only one illustration out of many that might be given.

In point of fact, the ancient legal conceptions no more correspond to the modern than the morality of the olden time corresponds to the morality of to-day. In the patriarchal period, it was not thought immoral for a Jacob to supplant an Esau by practising a trick on his blind and aged father, nor for a Jael to slay a Sisera when sleeping peacefully in her husband's tent. The age of Homer was an age of heroes animated by high courage and devotional piety; yet in the Homeric literature, as Sir Henry Maine has pointed out, the deceitful cunning of Ulysses appears as a virtue of the same rank with the prudence of Nestor, the constancy of Hector, and the gallantry of Achilles. Even now the boundary between law and morals shifts as the sands of the sea shift with the ebbing and the flowing tide. The tendency of civilization is to enlarge the first at the expense of the second, to convert the voluntary morality of one generation into the obligatory law of the next. Instances of this will at once occur to you, both in the civil and the criminal law. One of them is furnished by the doctrine of fraud. Fraud may be a moral delinquency, a civil tort, or a crime. For a tradesman to pass off his goods as another's was at one time a moral delinquency only. It is now a civil tort, which may be restrained by injunction or redressed by damages. Every fresh remedy given by the civil courts against fraud trenches *pro tanto* on the field of morals and enlarges the field of positive law. Every statute which creates a fresh crime does precisely the same thing. The English Criminal Law Amendment Act of 1885, the Act for the punishment of fraudulent trustees, the provisions of our Merchant Shipping and Public Health Acts, which have converted into criminal offences what were once at most actionable wrongs, are instances in point.

Passing on from the general inquiry into the nature of legal conceptions, the next question which attracts the legal historian is, how have these conceptions become interwoven into the particular system of law which he desires to investigate? Let us suppose that this system is our own and confine ourselves to that. What is the origin of Anglo-American law, that is to say, of that large body of jurisprudence which your country and mine possess in common? The answer you will have already anticipated. Its origin is composite like that of the race itself. Its staple is

unquestionably Anglo-Saxon, but there is a large admixture besides. It may, for all we know, hold a British or Celtic element concealed in some unknown form which has hitherto eluded our vision. It is certain that it contains a Scandinavian element imported by the Danes, and a Frankish element imported by the Normans. The extent to which the Roman law has also entered in is a matter on which there is much difference of opinion. That it did enter in, to a large extent, without becoming, so to speak, naturalized amongst us, I, for one, fully believe, and with your permission I will shortly state my reasons. They may be taken as supplemental to those furnished by Mr. Howe, of New Orleans, in the able paper he read to this Association at Detroit last year.

We start with the undeniable fact that for more than three centuries Britain was entirely a Roman province, and was occupied by Roman legions for more than five centuries. Papinian, one of the most famous of Roman juriconsults, dispensed justice in the forum of York, if we may trust Dion Cassius, writing in the third century; and according to a tradition current at the time of the Commonwealth, and which is vouched for by John Selden, no mean antiquarian authority, Ulpian, and Paulus, venerable names familiar to every student of the law of Rome, exercised the functions of assessors in other parts of the island. Now, just as the characteristic of ancient Greece was a love of art, so the characteristic of ancient Rome was a love of law and order. It would, therefore, be, indeed, strange if Roman jurisprudence, though planted originally in Britain by force of arms, had not left its mark behind long after the victorious legions had been withdrawn.

I am aware that Sir Frederick Pollock and Dr. Maitland, in their monumental work on the History of English Law, published in 1895, contend the contrary of this, and maintain that at no time was Roman law introduced into England first-hand—at least on any appreciable scale. They admit, however, that it found its way there as early as the eighth or ninth century ‘at a second remove,’ and that this introduction was effected through the English clergy, who brought with them Latin forms and phrases primarily intended for ecclesiastical affairs, but capable of adaptation to affairs secular. They also admit that with the Norman invasion a further importation of Roman law took place, the Dukes of Normandy having adopted the official machinery of the Frankish Government, including, of course, whatever Roman elements had been taken up by the Franks. They observe further that in this way institutions which have nowadays the most homely and English appearance may be connected through the customs of Normandy with the system of government elaborated in the latter centuries of the Roman Empire.

These statements, coming from so authoritative a quarter, are unimpeachable testimony to the existence of Roman law in England long before the middle of the twelfth century, when the Roman Digest first began to be regularly expounded in Italy. After that date its influence became, as is well known, more marked. The powerful school, or university, formed in Bologna about the year 1150, attracted students of Roman law from all parts of Western Europe, including the British Isles, and such seeds of it as had already taken root on British soil thenceforward acquired fresh force and vitality. About the same time the canon law of Rome (which was deeply impregnated with the Roman law, although it had an independent origin) reared its head throughout the continent, greatly strengthened, as it was, by the publication of the collection of conciliar and papal decrees known as the *Decretum Gratiani*. This canon law was administered in Britain by the bishops, side by side with the secular law of the King's courts, as is shown by the fact that the Constitutions of Clarendon provided, in the year 1164, a ready method of settling any conflict between the two jurisdictions. Much of the canonical jurisprudence still survives in the law relating to wills of personalty, and down to quite recent times it was an important factor in the law relating to married women. In England, Divorce Acts and Married Women's Property Acts have of late 'changed all that,' and the advent of the New Woman has stamped the change as irreversible.

The argument in favour of the influence of the Roman law upon our own is greatly strengthened if we turn to the work attributed to Henry de Bracton, Justice of the King's Bench in the reign of Henry III. Bracton's method (like that of Azo of Bologna from whom he largely borrowed) is the same as that of Justinian's Institutes, and numerous passages from the Digest and the Code are scattered throughout his pages. To determine the precise extent to which Bracton 'Romanized the English law' or 'Anglicized the Roman law,' is, however, by no means easy. Opinions on the point greatly differ. They were collected some time ago by my friend Mr. T. E. Scrutton in a paper which he contributed to the *English Law Quarterly Review*, and I have his leave to reproduce them here.

Mr. Reeve, the well-known legal historian, thinks that the Roman law was only used by Bracton as an illustration and an ornament, and was not regarded as an authority, and he doubts whether the Roman parts of his work would if put together fill three whole pages. M. Houard, on the other hand, is so struck with Bracton's Romanizing tendencies as to omit him entirely from his collection of Anglo-Norman legal sources, viewing him as a polluter of the

pure stream of English law. Sir Henry Maine speaks of the 'plagiarisms of Bracton,' and considers it one of the most hopeless incidents in the history of jurisprudence that an English writer of the time of Henry III should have been able to put off on his countrymen as a compendium of pure English law, a treatise of which the entire form and a third of the contents were directly borrowed from the Digest. Biener, like Reeve, holds that Bracton, although citing much Roman law, attributed no authority to it. Spence, on the other hand, declares that there is scarcely a principle of law stated in Bracton which may not be traced back to the Digest or the Code. *Quot homines, tot sententiae.*

Mr. Scrutton's own view, in which I venture to concur, strikes a mean between these opposite conclusions. As regards the first part of Bracton's work which deals with the law of persons, the different modes of acquisition, and the nature of contracts, this, probably, was copied directly from Roman sources, and, as English law, was new; while the second part, which deals with donations, possession, inheritance, and the theory of actions, was partly old English law, and partly law derived from the Roman which the decisions of a long line of clerical judges had made law of the land.

Let me now push the argument a little further by enumerating a few instances of the way in which our early jurisprudence closely resembles that of Rome.

I will begin with the ideas which lie at the root of English real property. No lawyer will deny that if we wish to understand the elements of real property law, we must study the feudal system. Feuds are the fountain whence our notions of proprietary right in the realty originally flowed. Thither the student in conveyancing must still resort for the principles, and even the practice, of his art. Other branches of jurisprudence may be taught, without quoting obsolete usages; but it is not so with the law of real property. The elements of that law lie remote in the annals of the fiercest and darkest period—a period, as has been well said, of lawless chiefs, and armed retainers, dwelling under a system, turbulent in its vigour, and corrupt in its decline, yet destined even when in ruins to influence the habits and mould the institutions of the most enlightened nations of Europe.

At first sight, this feudal system, and the incidents of land tenure which were part of it, appear to be peculiarly Teutonic, but even here an affinity with Roman practice, if not the direct influence of Rome, may be clearly discerned. A close analogy exists between the well-known relations of the feudal lord to his vassal and that of the Roman patron to his client. The Roman client was, I need not remind you, bound to treat his

patron with reverence, to furnish him with aid to marry his daughter, and to redeem him when taken captive—incidents these inseparable from the feudal relationship, and expressly reserved to the feudal lord by the Magna Carta of King John. 'The patron,' says Dionysius of Halicarnassus, 'was the legal adviser of the client. He was the client's guardian and protector as much as he was the guardian and protector of his own children. He maintained the client's suit when he was wronged, and defended him when he was charged with having wronged another. The client in return for these services was bound to accompany his patron to war.' Compare with this description the relation between the feudal lord and the feudal vassal. What was the principle of a fief? A mutual contract of fidelity and support. It laid on the lord the obligation of protecting his vassal; it imposed on the vassal the duty of military service towards his lord.

But this is not all. Tacitus in his *Germania* records the fact that a practice had grown up in his day of committing to the care of Roman veterans, or to the Gallic or German tribes, that part of the public domain which was on the extreme frontier, to be held by them and their descendants on the condition of their performing soldier service for the state. The title to the lands thus granted, which were known as *agri limitrophi*, passed by delivery of possession. There is surely here more than an accidental resemblance to the tenure of land which was in force in England until the 12th of Charles II, and to the 'livery of seisin' which was in general use there as late as 1845, and has never been formally abolished.

Again, the characteristic distinction between the legal and the equitable ownership of land finds a precise correspondence in that which subsisted at Rome between property held *jure Quiritium* and property held *in bonis*. The analogy is the more significant because such a severance of law and equity is by no means general. Gaius notices it as a peculiarity of the Roman system, and contrasts it with the absolute ownership which alone was elsewhere recognized.

Another point of contact with Rome is to be found in the English doctrine of 'uses' and 'trusts.' How far these were actually derived from Roman law has been much debated, and will continue to be so. Ingenious have been the conjectures started by the anti-Romanists in their efforts to find for them an independent origin. We are told by some—and your own countryman, Mr. Justice Holmes, whose great learning commands my deepest respect, was, I think, the author of the discovery—that the feoffee to uses corresponds point by point to the *Salman* of the early German law as described by Beseler in his *Erbverträgen* some sixty years ago. The *Salman* was unquestionably a person to



whom land was transferred in order that he might make a conveyance according to the grantor's direction, but the conveyance was generally only to take effect after the grantor's death, the grantor reserving to himself the enjoyment of the land during his life. Notwithstanding this posthumous character of the *Salman*, Mr. Justice Holmes considers that his likeness to the feoffee to uses is such as to warrant the inference that the latter was but the former transplanted. I confess to be old-fashioned enough not to be convinced by this reasoning; I prefer to assign the 'use' to a still older foster-parent than the *Lex Salica*, viz. to that to which, for aught we know, the *Lex Salica* may have been itself indebted, I mean the *fideicommissum* of the later Empire. *Fideicommissa*, as every student of Roman law knows, were originally introduced in connexion with the law of wills. At first they were precarious, depending entirely on the honour of the trustee, but they were ultimately placed under the protection of an established public functionary, the *praetor fideicommissarius*. The object of imposing the *fideicommissum* was to evade the strict rules of the civil law by transmitting property to aliens and others who were legally incapacitated from taking anything directly under the will of a Roman citizen. No one looking at the early history of English equity can fail to see the parallel. The observance of the 'use' or 'trust' was enforced by the early clerical chancellors precisely in the same way as the *fideicommissum* was protected by the Roman praetors. Its object, too, was strictly analogous, namely, to evade the strict rule of the statute law, which prohibited alienation in mortmain.

The catalogue of points of resemblance between the Roman system and the English might, if time permitted, be greatly extended. I will only mention a few more items. Every one must agree that our law of easements owes its origin to the Roman servitudes, and Lord Holt's judgment in the celebrated case of *Coyne v. Bernard* shows how much our law of bailment coincides with, if it was not derived from, the Roman learning on the same subject. The distribution of an intestate's personalty under the statute of Charles II is based on the *Novellae* of Justinian, and so is our mode of reckoning degrees of kindred. The *Donatio mortis causa*, the *cessio bonorum*, the doctrine of the property, or absence of property, in *ferae naturae*, were all directly borrowed from the law of Rome, the very names of the things borrowed having survived to bear witness to that fact.

I now pass on to say a few words upon another and distinct branch of the history of our jurisprudence, viz. its internal development. Just as the annals of the language of a country cannot be regarded as complete which do not tell us something of the growth

of its literature and mark the epochs of its greatest writers ; so, no legal history can be perfect which does not show us how our domestic law has adjusted itself by slow degrees to the social wants of the people. We must not forget that, after all, the effective laws of a country are only an expression of the national tone and temper for the time being. Legislation can never 'force the pace'; it must always lag behind, rather than precede, the popular demand for it. The connexion which subsists between the outward circumstances of society in any particular age and the legal characteristics of that age may not, indeed, be always clear, but it is certain that the more we know of the antecedent historical facts, the more thorough is the insight we gain into the law which is their product. As Mr. E. J. Phelps said in a speech which he made in Edinburgh some ten years ago : ' Law, however fundamental, is but the reflex of public opinion, and in the long run, in a free country, must be maintained by that opinion or must perish.'

Again, just as law is modified by history, so is history in some degree modified by law and even by legal forms. Of this truth there are many illustrations from which I will only select two.

Consider the effect which the Norman form of tenure had on the power of the Crown. According to continental feudalism, the vassal owed allegiance to his immediate lord, and not to the lord paramount, who was, in England, the king. Hence, whenever the king and the immediate lord happened to be in opposition to each other, continental feudalism strengthened the hands of the lord and weakened the hands of the king. The Conqueror wisely insisted that (contrary to the feudal principle) allegiance should be owed direct to the king and not to the immediate lord. This innovation coloured the course of our constitutional history right down to the time of William and Mary.

Consider, again, the effect of the arbitrary and cruel forestal laws which the Conqueror introduced to protect his favourite diversion of hunting. These forestal laws were the occasion of many of the terrible disorders of those times, and had an important bearing on our early social history.

Consider, again, how legal changes helped to work social changes during the stirring wars of the Roses. Then was introduced the fiction of the common recovery, which dealt a fatal blow to family entails, and, by rendering the lands of the nobility forfeitable for treason, caused them to be subdivided amongst the wealthier members of the middle class. The frequent conveyances to uses to be met with at this period were due to the same increasing desire to shake off the feudal yoke, and to escape the consequences of attainder. Indirectly, too, these same 'uses' had a result much more

ages of the earth may be read in some perpendicular section of its surface.'

With this expressive simile, for which I am indebted to John Stuart Mill, I might well conclude, but there is one other aspect of legal history which we cannot leave out of sight since it confronts us on the path which as professional men we are called upon to tread.

It is the boast of some English practitioners, and it may be the boast of some Americans also, that they want to know the law of to-day and do not care to trouble themselves about the law as it was centuries ago. Well, but is not our legal system, a system of government of the living by the dead, and is it possible fully to understand the law of to-day without some knowledge of ancient law? Once we admit that we have to be guided by authority, we must also admit that we cannot read authority aright unless we can truly estimate the conditions and qualifications under which alone it can be safely applied. These conditions and qualifications can only be known by going back to the source of the authority, by considering the material or social needs which called it into existence. Take any legal doctrine that has come down to us through the ages, crystallized, perhaps, into a phrase. Nothing is easier than to accept such a phrase as settling a disputed point out of hand, and nothing more dangerous. Half one's time as an advanced practitioner is spent in mastering the limitations of formulae which as students we swallowed whole and retained undigested. When we have tracked a principle home, we find very often that it has to be re-stated, and that when so re-stated it throws quite a different light on the matter in hand, or else (no uncommon discovery) that it has no bearing at all.

Let me demonstrate the practical value of archaic law by one or two examples.

The English system of common law pleading was finally swept away by the English Judicature Act of 1873. It had been encumbered with obsolete learning, and had been terribly abused by the ingenuity of pleaders during centuries of adroit manipulation. The abuses were not, I think, organic, and much had been done to remedy them; but the system had fallen into discredit, and had become the scape-goat for the sins of the profession. It was determined that it should no longer be necessary to plead formal causes of action, but that each party should tell shortly his plain tale unfettered by technicalities, or, as the rules expressed it, that his pleading should contain, and contain only, a summary statement of the material facts on which he proposed to rely. The change was of enormous historical importance. The old system had been

the mould upon which the whole common law had been gradually formed. All legal conceptions had been defined, analyzed, and formulated through the operation of that elaborate machinery. It provided a natural classification of the law, saving it from absolute chaos, so that students learnt their principles as they went along by mastering their procedure.

Declarations, pleas, and demurrers have now become matters of antiquarian interest, so far as actual practice is concerned. But, until the whole system of English law shall be recast and codified, the old learning respecting them will be indispensable to all who wish to be sound common lawyers. Without it a great deal of quite recent authority will remain obscure, and the old books in great measure unintelligible. Even in so simple a matter as an action of contract, it is necessary to know the peculiar, and not unromantic, history of the action of assumpsit. In an action for injuries against a carrier, we must still be familiar with the distinction between a breach of the duty to carry safely and a breach of the contract to carry, though we are no longer put to a choice between the one and the other form of action. And, so long as written pleadings remain, the best masters of the art will be they who can inform the apparent licence of the new system with that spirit of exactness and self-restraint which flows from a knowledge of the old.

Let me take, as a second illustration, a case which occurred in England a few years ago. Nothing at first sight seems simpler than the maxim, '*Quicquid plantatur solo, solo cedit.*' It is first met with, so far as I am aware, in this precise form in Wentworth's Office of Executor, published in 1641, but it is to be found both in Gaius and the Digest, though in slightly different terms. The statement in the Digest is this: '*Cum in suo solo aliquis aliena materia aedificaverit, ipse dominus intelligitur aedificii, quia omne quod inaedificatur solo cedit.*' But under what circumstances is the rule applicable, and are there any exceptions to it? This was the very question that arose in the case I am about to mention.

The plaintiffs were landowners in one of the mining districts of Derbyshire; the defendants were owners of a lead mine situate under the plaintiffs' soil, and they had the right, by a local statute, to search there for veins of ore. The defendants had erected buildings on the plaintiffs' land in aid of their mining operations, but when the mines proved unremunerative they pulled these buildings down and sold the materials. The action was brought by the owners of the surface to recover the value of these materials, on the plea that, as soon as the buildings were erected, they, and all that was fixed to them, became the property of the surface-

owner. The maxim I have quoted was relied on as establishing this. The case was fought in three Courts, and in each the plaintiffs failed. The House of Lords, which finally decided it, pointed out that what the Digest really said was that where one man built on his own soil with another's materials the latter became *for the time being* part of the soil on which the building stood, but that as soon as the materials became chattels by the destruction of the building, the property in them reverted in their original owner, and was divested out of the owner of the soil. In short, the authority relied on by the plaintiffs, when examined with the context, proved the exact contrary of that for which it was cited, and absolutely destroyed the claim it was assumed to support<sup>1</sup>.

The last illustration I shall trouble you with is a case of my own heard in the English Court of Appeal in the spring of the present year. I know it is dangerous to refer to one's own cases, because one is apt to magnify their importance, but this one I think you will allow to be in point. The question was whether a strip of land, part of the original bed of the Thames, but from which the water of the river had receded, belonged to the defendant, as owner of the bed, or to the plaintiffs as proprietors of the land and bank in close proximity to which the strip lay. The limits of the plaintiffs' land, as defined by their bank and the trees growing on the edge of it, had never altered physically, but it was contended on their behalf that the *jus alluvionis* applied, and that the dry bed had, in law, become annexed to the bank, although lying six feet below it. On the other hand, it was contended on the part of the defendant, for whom I acted as counsel, that when the original boundary of the property in dispute could, as here, be clearly ascertained by inspection of the ground, the *jus alluvionis* had no application. In support of this latter proposition reference was made to Bracton, Britton, Fleta, and Lord Hale, as well as to a case decided in the 22nd Ed. III which we unearthed from the dusky archives of the Year Books. As the Court was against the plaintiffs on grounds immaterial for the present purpose, but sufficient to dispose of the case, our contention with regard to the limitations of the *jus alluvionis* did not come up for actual decision. There was, however, a clear inclination of judicial opinion in its favour. The President of the Court, Lord Justice Lindley, agreed that the defendant's proposition might be true 'if the boundary were a wall or something so clear and visible that it was easy to see whether the accretions as they became perceptible were on one side of the boundary or on the other'; while his colleague Lord Justice Smith was of opinion that the authorities cited pointed to the conclusion

<sup>1</sup> *Wake v. Hall*, 8 App. Cas. 195.

that wherever the metes and bounds were defined, as they were in the present case by a bank six feet high, the doctrine of accretion relied on by the plaintiffs could not be successfully invoked<sup>1</sup>.

Now mark this curious fact. The passage in Bracton on which we on the part of the defendant relied is taken straight from Azo and is in these words, 'In agris limitatis locum non habet jus alluvionis.' Now, *ager limitatus* was a technical term for land which had been assigned to individuals by a public authority when a fresh territory was captured or a new colony founded. It was laid out by the *agrimensores*, and its limits were defined by boundary stones called *termini*, usually named after a Roman emperor. The antithesis to it was the *ager arcifinius*, the boundaries of which were either natural, as mountain ridges and rivers, or artificial, as water-conduits, ramparts of earth, and so forth.

This distinction once appreciated, it is plain that the plaintiffs' land, the natural boundary of which was the bank, was really *ager arcifinius*, and not *ager limitatus* at all. It is equally obvious that since there is no *ager limitatus* in England, in the only proper sense of that term, the passage in Bracton (assuming that writer to have understood it himself, which Dr. Maitland doubts) forms no part of English law. The case is now beyond appeal; I cannot, therefore, be taken to task by my client for letting the fact be known. I mention it by way of urging the importance of not trusting to the dictum of a text-writer, however eminent he may be, and of going to the root of the matter in every case with which in our daily practice we may have to deal.

Mr. President and Gentlemen, I have now finished. I am not going to indulge in any more personal reminiscences or any more professional confidences. I have not, as I intimated at the opening, put these thoughts on paper with the object of imparting instruction. My aim has been rather to stimulate—to stimulate the younger men to pursue legal history side by side with their strictly professional work, and to prove to any older ones who may be disposed to look at law only from its money-making side, that there are more things in heaven and earth than are dreamt of—I must not say in their philosophy, for they would probably scorn the word—but in their actual experience.

I will not now detain you longer. I will only thank you all for giving me so attentive a hearing, and crave indulgence of such of my legal brethren—for are we not brothers in law?—as may desire to exchange the forced attitude of listener for the fascinating rôle of candid critic.

MONTAGUE CRACKANTHORPE.

<sup>1</sup> *Hindson v. Ashby*, '96, 2 Ch. 1.

## LAND TRANSFER AND LAND REGISTRY.

NO legal reform at present before the public for consideration is of a wider or more far-reaching nature than the proposal to abolish the system of transferring land by written documents, executed with due legal solemnities and retained as evidence of title by the persons entitled, and to substitute for it a system by which every transaction in land shall be effected by the act of a public functionary carried out in a national office called a Land Register Office, the titles being entered in a gigantic index upon which the names of the owners of every acre of English land are to be recorded. Such a revolution in conveyancing will affect for good or ill the whole landed interest of the country, from the estates of our wealthiest noblemen down to the modest allotment gardens of country labourers, or the still smaller plots of ground on which thrifty workmen in manufacturing towns build their cottages. And yet we have seen land transfer bills with this object introduced, year after year, without attracting public attention or even leading to as much discussion as would be elicited by a fracas in an Irish village or an unduly severe magisterial sentence on a poacher. Year after year bills for prohibiting Englishmen from recording their dealings with land by private deeds have passed the House of Lords without opposition, our great landowners being apparently under the impression that any suggested reform which was declared by its authors to have a prospect of expediting dealings with land and reducing lawyers' bills, must be an improvement, and that as the Lord Chancellor of the day had taken it up it must be all right. Only once, when the bill included the abolition of the ancient feudal law by which land in cases of intestacy goes to an eldest son, substituting for it the rules applicable to the inheritance of personal property, did the House of Lords throw it out, even though introduced by a Conservative Lord Chancellor.

During the last session of the late Parliament, a Committee of the House of Commons, presided over by the late Attorney-General (Sir Robert Reid), took a large body of evidence upon the proposed system of compulsory registration of land titles, but adjourned

without coming to any decision in consequence of the impending dissolution of Parliament. The Lord Chancellor (Lord Herschell) stated the arguments in support of the measure at length; and on the other hand a number of members of the legal profession having special experience of the subject, some as conveyancing barristers, others as solicitors, many of whom came from distant cities, expressed and gave reasons for the opinion that the proposed method would not attain the object sought, but would lead to additional expense and delay, especially in small transactions.

In the course of the inquiry some of the witnesses explained a different method for reducing to a minimum the investigation of a vendor's title to dispose of his land, and simplifying the actual transfer. Their proposal followed the lines of existing reforms and retained the freedom of landowners to carry out their contracts between themselves, without the intervention of a public official. This plan has been embodied in a bill prepared under the auspices of the Incorporated Law Society; and it is proposed to explain in this article as concisely as possible the position of the question, and the two plans between which Parliament may at an early date have to decide, for the consideration not only of lawyers who are familiar with our conveyancing customs, but of that wider public with whom the decision will ultimately rest, but who may not be practically so well acquainted with the land laws of England.

It is desirable first to sketch the growth and development of the present system. Among the Goths and Swedes, as Serjeant Stephen tells us, contracts for the sale of land were made by word of mouth in the presence of witnesses, who extended the cloak of the buyer while the seller cast a clod of the land into it, in order to give possession, and a staff or wand was also delivered by the vendor, through the hands of the witnesses, to the purchaser. With our Saxon ancestors the delivery of a turf was a common, perhaps a necessary solemnity, to establish the conveyance of lands. A curious survival of this ancient custom still exists in the conveyance of copyhold estates, which is effected by the delivery of a rod (or in some manors a straw) by the vendor to the lord of the manor or his steward, in token of a 'surrender' of the land into the hands of the lord, the rod (or straw) being immediately thereafter re-delivered to the purchaser in token of his 'admission' to their ownership.

But when advance was made in the art of writing, and the importance of preserving a permanent record of transactions of this nature was universally felt, the custom of written deeds was introduced. The earliest form of written conveyance used as



a 'common assurance'<sup>1</sup> was a charter of feoffment, still accompanied by a delivery (technically called livery of seisin) either of actual possession or of a clod or turf, or a twig or bough, as a symbol thereof. The custom of deeds with wax seals, which each party sealed with his own special seal, was introduced by the Normans: but still the deed was only a common and advisable way of recording the feoffment, which might be valid without any writing at all. Signed writing was first required by the Statute of Frauds, A. D. 1677, and a deed only in 1845.

During this period of the development of our land system, there was a difference between the method of transferring reversionary interests in land and incorporeal hereditaments, such as advowsons, rents, or the like, which could not be actually or even symbolically delivered on the one hand, and of conveying actual land in possession on the other. The former were said to 'lie in grant,' the latter to 'lie in livery.' That is, the property in the former passed by force of the deed, the latter by force of the livery of seisin or symbolical delivery. It is true there was an alternative method of transferring land without livery of seisin, by the operation of the Statute of Uses on what was called a deed of 'bargain and sale,' which however was required under a statute of 27 Henry VIII to be enrolled in one of the Courts at Westminster or with the *custos rotulorum* of the county, when an estate of freehold was conveyed by it, though that formality was not requisite when an estate for years only passed. But this distinction led the conveyancers of that day to devise a curious evasion both of the rule requiring actual livery of seisin on the conveyance of an estate in possession, and of the necessity of enrolling a deed of bargain and sale. It became customary to grant a lease (or rather to bargain and sell the land) for a year, and then by a deed of 'release' dated on the next following day to enlarge this term into a freehold estate. For more than two centuries this cumbrous method of executing two deeds for every purchase (familiarily known as a lease and release) was the ordinary and usual method of conveying land, and it was only in 1841 that by an Act of Queen Victoria's reign leases for a year were dispensed with, a release being declared to be equivalent to a lease and release, while, four years later, the form of conveyances was further simplified by an Act declaring that land should be deemed to lie in grant as well as in livery, and actual or symbolical delivery therefore became needless.

There were other complications in the ownership of land which

<sup>1</sup> The Anglo-Saxon charters, though numerous, were special acts of sovereign favour, or made in exercise of powers conferred by such acts, and were not part of the customary system.

were dealt with by the Legislature about that time. Land belonging to a wife could not be conveyed by her by a deed, and even the prospective right of a wife to dower out of her husband's lands had been held to be a charge on the land of which the lady could not divest herself by executing a deed. But a method had been sanctioned by the Courts under which she and her husband might allow an action to be brought against them in the Court of Common Pleas, and then compromise it by admitting the right of the purchaser in court or before commissioners appointed by the court, and so part with her interest in it. This process was called 'levying a fine.' Again, when land was vested in a man for an estate tail, that is, to him 'and the heirs of his body,' he could not bar the rights of his issue by a deed, and the only process by which such an estate could be granted was a fictitious lawsuit. A collusive action was brought by the purchaser to recover the land from the owner of the tenancy in tail. The latter alleged that the land had been warranted to him by a third person, a man of straw, who was usually the crier of the court. All parties admitting these fictions, judgment was given for the 'recovery' of the lands from the tenant in tail, and the latter had judgment to recover on behalf of himself and his issue lands of equal value from the poor crier (technically called the common vouchee) who, however, was never called on to make it good. This strange process was known by the name of a 'common recovery.' In these days of commonsense reforms, it seems incredible that these ludicrous travesties of legal proceedings were not only sanctioned and recognized by the courts of law, but were the method by which the rights of married women and those of future issue in tail were regularly dealt with and vested in purchasers. In 1833, however, they were swept away, and it was enacted that by a deed duly executed and enrolled in court, and in the case of a wife acknowledged by her before commissioners, the owners of estates tail might bar the entail, and married women might deal with their landed property, the vested right of a wife to prospective dower being also terminated by the statute.

But the investigation of the title to lands and the method of dealing with them was still far from a simple process. The desire of the owners of considerable estates in land to make provision for their families was habitually effected by somewhat complicated provisions in wills and settlements. In most cases the inheritance of the land was vested in the eldest son, and provisions were inserted creating terms of years in the estate, by which charges might be placed on it for providing a jointure for a widow, portions for younger children or the like. If the land was dealt with, all these

subordinate interests had to be investigated, and a conveyance from the various persons in whom they were vested obtained. Nay, even if there were persons interested in the money to arise from the sale of the land, or entitled to charges upon the proceeds, all these interests had to be traced out and investigated and the concurrence of their owners secured. And the deeds by which such concurrence was given were necessarily long, as the recitals explaining the various interests were usually lengthy, and the documents were still further extended by the insertion of a number of covenants by the vendor warranting his title.

These difficulties were dealt with in a masterly way by Lord Cairns. He carried through Parliament two Acts called the Conveyancing Acts, 1881 and 1882, and another called the Settled Land Act, 1882, by which a great reform was effected in all deeds relating to land. A conveyance or a mortgage under these Acts need now be no longer than a single page of foolscap paper, exclusive of the description of the property transferred. An appointment of new trustees may contain a single sentence vesting the trust property in the new trustees, a proceeding which prior to these reforms often necessitated considerable cost in application to an equity judge for a vesting order. And under the Settled Land Act, 1882, the tenant for life of an estate has the absolute right (with certain exceptions for which judicial sanction is required) to sell, and vest in the purchaser a perfect title to land included in the settlement or will under which he holds it. Whatever be the complications or difficulties arising in the dispositions of the property subsequent to the life estate, the purchaser is relieved from the necessity of investigating it. Since the passing of these able and effective reforms, which were prepared and carried through Parliament by Lord Cairns with the assistance of Mr. Wolstenholme, an eminent conveyancer, and one of the Conveyancing Counsel to the Court, the process of inquiring into the ownership of land, and transferring that ownership from one person to another has been immensely simplified. And it is desirable to mention—especially as it has been sometimes imputed to the legal profession that they oppose in their own interest law reforms tending to simplify and cheapen legal work—that these excellent practical improvements in conveyancing forms were cordially welcomed and universally adopted, although their adoption was purely voluntary.

I now come to the question which has been so frequently and urgently pressed on the attention of the Legislature, the adoption of a register. There are two possible kinds of register—a register of deeds, under which land would continue to be passed by signed or sealed documents, needing only a ministerial officer to record and

index them—and a register of titles under which the land would pass by the entry made by a public officer therein. The latter kind of register would require to be conducted and managed by a skilled lawyer at the head of each office where titles can be vouched and transfers registered.

During the last seventy years the question of adopting one or other of these plans, put forward as methods of diminishing expense and delay in dealing with land, has occupied the minds of several Lord Chancellors. They have been inquired into by several Commissions and Parliamentary Committees; and one of them has been the subject of two important Acts of Parliament (in 1862 and 1875), establishing and afterwards remodelling a registry of title, which has admittedly not proved a success, and has not been acceptable to landowners. It is somewhat curious to observe the oscillation of opinion between these two kinds of register which has taken place during this period.

For some two centuries prior to 1828 there had been registers of deeds in the counties of Middlesex and Yorkshire and in the Bedford Level, in which all deeds were required to be recorded. In that year a Commission presided over by Lord Lyndhurst recommended the establishment of a general register of deeds in London for the whole of England. Bills for this purpose were introduced in 1830, 1834, 1845, 1846 and 1851, but never became law. In 1854 a Royal Commission was appointed, which in 1857 made a report recommending the establishment of a register not of deeds but of titles. In 1859 a bill to carry out the recommendation of this Commission was introduced by Sir Hugh (afterwards Lord) Cairns, who was then Solicitor-General; but the bill did not pass into law. In 1862 Lord Westbury carried through Parliament an Act to establish a register of titles enabling a landowner to apply for, and on satisfying the registrar of his title, to obtain, an absolute certificate of ownership. This Act allowed a landowner to take his title off the register if he thought fit; and in the course of twenty years 488 properties were registered under it, of which 131 were subsequently removed. As the estimate of the number of transactions in land is 300,000 per annum, the system regarded as an experiment had proved a failure. And that was the opinion of a Royal Commission appointed in 1868, which reported in 1870, the main ground then suggested being the great expense and delay consequent on the minute and exhaustive official examination of the title requisite before a certificate could be granted of conclusive or absolute ownership, including an investigation into the exact boundaries on every side. The Commission therefore recommended the introduc-

tion of a system of registration with a merely possessory title. This, they said, would be of little use for the first twenty years, but would confer a title 'increasing in validity until it becomes marketable in the technical sense, and practically indefeasible.' Bills for carrying this recommendation into effect, but providing for compulsory registration after two years from the passing of the Act, were introduced in 1870 and 1873, but failed to become law. Another similar bill was introduced in 1874, from which, however, purchases under £300 were exempt; but this bill after passing the House of Lords was dropped in the House of Commons, the compulsory clauses being strongly opposed.

In 1875 the bill was reintroduced by Lord Cairns without the compulsory clauses. The alternative was given of applying for a certificate of absolute title (which in the course of the application might take the form of a qualified title, that is, a title absolute except for, and subject to, some specified defect), or a possessory title. But the provision empowering a landowner to remove his title from the register was struck out, and ultimately the bill remodelling the Land Registry, but still leaving the use of it permissive, passed into law. Still, however, the system even in its remodelled form proved unsatisfactory, and was not adopted by the public; and in 1878 a Select Committee, of which Mr. (now Sir George) Osborne Morgan was chairman, was appointed to inquire into the whole question. This Committee prolonged its inquiries through two sessions, and reported in 1879 that the Act might be considered to have become for all practical purposes a dead letter, and that compulsory registration of title was not feasible. In the evidence given before that Commission, Lord Cairns expressed himself so clearly on the subject that it will be well to quote his words. He said (Q. 2871), 'The difficulty with regard to compulsion has always struck me in this way. There is in the first place the question how far you have the right to make the adoption of a particular system compulsory; but there is a question of still greater importance, namely, how far it is possible to make it compulsory. Now, as I have never yet seen any way by which it could be made compulsory, perhaps the first question is not so important as the second. Certainly no way that has yet been proposed would have the effect of making it compulsory to put the land upon the register.'

And another very eminent lawyer, Lord Thring, expressed (Q. 21) the same opinion.

In 1881 and 1882 Lord Cairns carried through Parliament the series of Acts relating to dealings with land already mentioned, which have been productive of very great benefit, have greatly

simplified the investigation of titles, and have shortened the length of conveyances and mortgages.

The next legislative proposals were those of Lord Halsbury, who introduced bills in 1887, 1888, and 1889, of which the first reached the House of Commons and the other two did not pass the House of Lords. In spite of the opinion of Lord Cairns and the report of the Committee of 1879, Lord Halsbury proposed to make registration of title compulsory, and also to assimilate in many respects the laws relating to real estate to those relating to personalty. Of this last reform a special feature was the provision that there should be a realty representative in whom land should vest on the death of the owner, and who should occupy a similar position to that of an executor in respect of personalty, that is, he would be able to dispose of real property in discharge (if necessary) of debts or other charges, and then to vest it in the persons entitled to it as heirs or devisees.

Finally I come to the proposals of Lord Herschell. In 1893 he introduced a bill similar in its main object, compulsory registration of titles, to that of Lord Halsbury. That bill reached the Commons too late for discussion. He renewed his proposal in 1894, but laid it aside in consequence of the Finance Act of that year, which charged probate duty (under the name of estate duty) on real property, and to some extent affected the position of real estate. In 1895 he again brought forward his plan, in which session the bill, after having passed the Lords, was referred to a Select Committee of the House of Commons. Before that Committee Lord Herschell stated at great length his reasons in support of his plan, and on the other hand a large body of evidence was given against the proposal. In the course of the inquiry an alternative plan for amending and simplifying the laws relating to land transfer was put forward by Mr. Wolstenholme and supported by other experienced witnesses. This has since been embodied in a draft bill submitted to the present Lord Chancellor, Lord Halsbury, and also published with a view of eliciting public opinion on it. By this plan, which is a further development of Lord Cairns' great reforms of 1881 and 1882, interests in land are divided into estates and fiduciary interests, the former being the only interests which are to be the subject of transfer as between vendor and purchaser. The estate owner is defined to be the owner of the absolute estate in the land, subject to terms, the interests of occupiers, and other paramount rights. He may be a tenant for life, who under the Settled Land Act, 1882, has now the power to dispose of land subject to the protection of trustees who receive the purchase money. Or he may be, in the case of terms, the owner

of only a leasehold interest. Or, thirdly, he may be the owner of a rent-charge or an easement. Fiduciary rights are the equitable ownership rights which will not affect a purchaser or require investigation by him, and the power of transferring the land will be vested in the estate owner, so that inquiry into intricate or complicated titles will be rendered unnecessary, and the transfer of ownership will become absolutely simple. In fact it will be assimilated, as nearly as the nature of property in land permits, to the transfer of stock or shares.

For the purpose of protecting the owners of fiduciary interests or other persons having claims, it is proposed, in analogy to the similar use of a *distringas* in the case of stock or shares, to empower the registration of cautions or inhibitions, the former of which will secure the due notice of any proposed transfer of the land and the right to intervene if such transfer should be contrary to right and justice, and the latter will render necessary the concurrence of the inhibitor or an order of Court. Searches for judgments, land charges and the like, which are now required, would then be replaced by the search for cautions or inhibitions, and an official certificate of that search kept with the last deed of transfer would practically limit the time to which the search need be extended. Mr. Wolstenholme does not propose to abolish the land registry, but to leave it as it exists for those who prefer that method of recording the title to their land. But he strongly advocates the restoration of the power contained in the Act of 1862 to remove land from the registry, by which many persons might be induced to use registration as an experiment who would not do so if they found that, although experience should show the method of transfer by registry to be unsatisfactory, they were unable to draw back after once placing their land on the register.

I now come to the reasons given for and against the introduction of a compulsory registry before the Committee of 1895. And in the first place we may consider the authority and experience of the various learned persons who have stated their views on either side. Lord Cairns, who thought no registration of title ought to be made compulsory, was certainly one of the ablest equity and conveyancing lawyers of the century; and Mr. Wolstenholme, a conveyancing barrister of very long experience and high eminence, was his assistant and fellow-worker in the successful conveyancing reforms of 1881 and 1882. Mr. Hunter and Mr. Lake, both of whom have held the office of President of the Incorporated Law Society, and who cordially supported Mr. Wolstenholme, have had exceptional experience in the practical working of the land system of the country, and of the existing permissive Land Register.

Lords Halsbury and Herschell are both men of high ability and standing; but both attained eminence as leaders at the common law bar, and neither of them has had practical conveyancing experience. In fact Lord Herschell admitted before the Committee that the only time he had any constant experience of conveyancing practice, was during his pupillage with a conveyancer. If then the halo which in English minds surrounds a Lord Chancellor be placed on one side, it must be admitted that their knowledge and experience of the subject are not equal to those of Lord Cairns and Mr. Wolstenholme. A curious side-light was also thrown on the evidence by the fact which came out, that both the two noble lords who advocated the introduction of compulsory registration of titles were landowners who had not registered their own titles, whereas Mr. Lake, who opposed it, had registered an estate of his own, and found the process so unsatisfactory and productive of expense and delay, that he had determined as the result of personal experience not to avail himself of the Land Registry for the future. And his conclusion was confirmed by other witnesses who had had special experience of the working of the Land Registry office.

The grounds for the compulsory change of the system of land transfer, as stated by Lord Herschell to the Committee, are:—

1. That wherever a change has been made (speaking chiefly of the Australian Colonies) there seems complete satisfaction with the registration system. His Lordship also referred to the systems existing in Austria and Prussia as being stated to be satisfactory.

2. That under the system of transfer by private deeds, an opportunity exists for fraud and forgery.

3. That it is necessary to investigate the title anew on each sale or mortgage of or other dealing with land.

4. That, consequently, the dealing with land by means of a register would be simpler and cheaper.

The grounds on which the opponents of a compulsory system base their opposition may be summarized as follows:—

1. That in England the existing permissive or experimental registration system, though it has been met with every wish to give it a fair trial, has been found productive of increased delay and expense. That in Australia the system is only applied compulsorily to lands where the title originated in a grant from the Crown, and is consequently simple, and that as regards other lands the employment of the register is voluntary, and has not been largely used. Further, in Australia the fees are nominal (as in English deed registries), while in England the fees for registry are *ad valorem* fees which, though on a scale diminishing upwards,



constitute an appreciable addition to the burden on land existing in the shape of conveyance and mortgage stamps, and have in fact been very largely increased since the register was established.

2. That transfers on a register are equally open to fraud, and forgery with deeds. Though there have been Dimsdale and Roupell frauds in the latter, there have been Robson and Redpath frauds in company registers, and in Australia there has been an instance of a fraudulent registrar through whose misconduct serious losses occurred. But on the whole the instances of fraud or forgery are so rare, that the proposed compulsory charge of a farthing in the pound or 2*s.* 1*d.* per cent. as an insurance fund would not only be unnecessary, but an additional tax on the land.

3. That having regard to the estimated number of transactions in land (about 300,000 per annum) the new system would necessitate the establishment of a very large and expensive land registry office, or probably a system of land registry offices throughout the country, each presided over by a skilled and educated lawyer. The whole expense of this large establishment would fall on the land of the country and be a wholly unnecessary burden; while the creation of a large body of public officials to transact business which can be transacted by the public for itself is most undesirable.

4. That the carrying out of every transaction in land—such transactions being scattered over all the towns and villages of the kingdom—which are now carried through by either one or two local lawyers, would require to be sent to London or the local county town, involving delay as well as travelling expenses, and the unnecessary importation of an additional person, viz. a public official, into the business. That while persons dependent for their livelihood on satisfying their clients are certain to be expeditious, a public officer is bound to take the applications brought before him in their turn, and that the universal experience of the transaction of business in public offices is that delay is thereby caused.

5. That the sanguine anticipation of the Lord Chancellor that expense and delay would be saved by a system of registration, is contrary to the experience of every one who has had practical experience of the existing Land Registry. That it needs to be borne in mind that the present Land Registry has a very small number of transactions on its books, while a compulsory registry would throw on the office such an enormous mass of work that prompt dealing with it would become almost impossible.

6. That the very large majority of the conveyancing transactions of the country is of small plots of land. A considerable body of evidence was given to show that in and near many of our

large towns the custom of selling landed estates in small plots for the use of working men and others is growing, and that the expense of each transaction is under a system of conveyance by deed extremely small, being from half a guinea to three or four guineas, exclusive of the government stamp, and further that such transactions are often carried through in a few hours. In all these cases, the expense of carrying out the transaction by a transfer registered in London or a county town, would certainly be largely in excess of the present cost, and delay would be necessarily caused. Similarly, delay and difficulty would occur in certain special classes of transactions such as transfers of public-houses. These are generally carried out by the meeting of the numerous persons interested at the public-house itself, which may be at a distance from the town where the register office is situate.

7. That it is a grave objection to the principle on which a register is based, that the title to registered land passes, not by the act of the parties, but by the entry on the register, and that if by mistake in the office or by fraud of the transferor, the registrar should transfer the land of *A* to *B* (a person innocent of the fraud) *A* may lose his land or his charge without being entitled to compensation. An instance was adduced before the Committee of a case in which a man who had bona fide advanced money on security of land in one of our colonies, and registered his charge, lost the benefit of it through the fraud of the man who executed it, and was also held by the Judicial Committee of the Privy Council to have no claim on the compensation fund. It is true that while the use of the register is as limited as it has been in England, great care can be exercised. But if all dealings with land have to pass through the register office, and some 300,000 transactions have to be carried through in a year instead of a few hundreds, mistakes cannot fail to be more frequent, and frauds to be rendered more practicable.

8. That the abolition of a long established system of dealing with land by duly executed deeds retained by the owner, and the substitution for it of a new system of public offices to which individual citizens will be compelled to resort to carry out their private business transactions, is legislation of so revolutionary a character and so great a hardship on landowners, that it can only be justified by extreme necessity or general desire; and that no evidence of such necessity or desire exists.

9. That as a land registry already exists, to which every landowner desiring to obtain the benefit of the new plan of dealing with his land can resort if he thinks fit, no public advantage can be obtained by compelling those landowners who take a different

view and do not desire to use the new system, to place themselves and their land titles in the hands of a state official. This argument is well put in the report of the Committee of 1879. They say, 'It would be very difficult to force upon every purchaser or mortgagee in this country a mode of dealing with his property which not one purchaser or mortgagee in 20,000 at present adopts of his own accord. Your Committee feel that in arriving at the above conclusion they are only acting upon the axiom which is laid down by the Royal Commission of 1868 in their report, and which they believe to be perfectly sound, that "for an institution to flourish in a free country, it must offer to people the thing that they want."'

Turning to the alternative plan proposed by Mr. Wolstenholme, Mr. Hunter and Mr. Lake, the opponents of a universal compulsory registration of titles contend that that plan, which is supported by the Incorporated Law Society, is a simple and practicable reform, and an extension of the great reforms of 1881 and 1882, which were promptly and universally adopted by landowners and the legal profession. They believe it to be a reform which would greatly facilitate the transfer of land, and render it so expeditious that no further amendments would be deemed necessary in that direction. They point out that it has been proposed by practical men with wide experience of the wishes and needs of landowners, and that it has been put into shape by one of the most experienced and able conveyancers of the day, whose co-operation with Lord Cairns in the great conveyancing reforms of 1881 and 1882, is evidence of his legislative ability and the soundness of his judgment in dealing with questions of this nature.

These two plans are what Parliament and the public will have to consider. The ultimate decision is one of great importance to all classes of the community, especially to landowners, who at the present time are suffering most severely from the depression of the agricultural interest. Although the questions involved may be somewhat intricate in their details, yet the broad principles applicable to them are such that every educated man, even though he may not have received a legal training, can appreciate and form a judgment upon them.

I will conclude by recapitulating the objects I have had in view. I have sought to trace as succinctly as possible the history of our laws relating to the transfer of land, and the gradual development of the method which now exists. I have also explained the proposal which has been recently submitted to Parliament for the abolition of that method, and the introduction of a new system, with the various reasons for and against that system given on each side. I have further sketched the alternative plan for attaining

the desired facility of dealing with land by simplifying the present method, and following the lines on which previous successful reforms have proceeded. It is to be hoped that Parliament will exercise the caution and deliberation which are its traditional boast and privilege, in legislating upon a subject which must have a wide and far-reaching effect upon some of the greatest and most important interests of the country.

EDMUND KELL BLYTH.

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## LAWYERS' BILLS—WHO SHOULD PAY THEM?

THE misery caused by lawyers' bills was a topic of unflinching interest long before Dickens wrote *Bleak House*, and has not lost much of its savour through anything that has happened since. The very stirring of the public mind by which the grosser abuses have been shaken off has only made us more keenly alive to the burdens that still remain, defying every kind of remedy yet suggested. Sometimes the blame is laid on the lawyers, and costs are taxed with such pedantic strictness by officials wise after the event, that an honest and able solicitor can hardly do what seems to him the best for his client without doing the worst for himself. At another time the rules of procedure are thought to be in fault, and the changes are rung from the extreme of technicality to the extreme of laxity in hopes of lessening the expense. Or again, with more reason, the costliness of litigation is set down to the uncertainty of the law itself.

Lawyers however know well, what laymen are apt to forget, that the administration of justice is essentially a delicate and difficult business, requiring a very large output of brain power, which must be met (under existing economic conditions) by corresponding cash payments on the part of somebody. Doubtless an article labelled 'justice' may be sold at as low a figure as you please; but if it is not the real thing it will not bring forth the peaceable fruits of righteousness.

May it not be that the remedy has been looked for in the wrong quarter, and that some of the ingenuity hitherto devoted to schemes for paring down the amount of law costs might be more profitably applied to devising a better adjustment of their incidence?

The current legal theory is that laid down by Justinian in A.D. 530, '*in expensarum causa victum victori esse condemnandum*<sup>1</sup>,' which is said by Messrs. Pollock and Maitland to have been only beginning to work its way into English law in the reign of Edward I<sup>2</sup>. If, as those learned writers tell us, it is a principle to which both English and Roman law came but slowly, that is no matter for surprise. The regrettable thing is that they should have come to it at all.

The practice of leaving each party to pay his own costs was

<sup>1</sup> Cod. III. 1. 6.

<sup>2</sup> Hist. Eng. Law, II. 295.

certainly indefensible, involving as it did a complete denial of justice to the poor, and to every one, rich or poor, whose costs would be likely to exceed the sum at stake. I do not know whether it was at any period applied by the Romans to court-fees<sup>1</sup>, and as regards advocate's fees and payments to witnesses it was perhaps only tolerated because the necessity for such disbursements was for a long time not officially recognized. When the policy of the ostrich had to be abandoned, two courses were open; one recommended by ethical, the other by fiscal considerations. The choice had to be made between the policy of state-paid justice and what I have seen somewhere described as the *vae victis* principle.

That Justinian should have preferred the latter is quite in accordance with all we know of him. The 'merciless reformer, whose reforms were directed solely by fiscal considerations<sup>2</sup>,' was not likely to drain his treasury for the relief of unfortunate suitors, and in his case a refined sensibility to the dictates of abstract justice as between subject and subject was quite compatible with gross partiality as between the state (that is himself) and his subjects. He saw clearly that to declare a party to have been entirely in the right, and then to send him out of court poorer than he came in, was a mere mockery of justice; he could not or would not see that it was only a little better to tell an ignorant layman that because he had failed to judge correctly the merits of his own cause he must pay the cost price of the skill and labour required to ascertain that he was mistaken. But it is curious that in these modern democratic days so unsocial a theory should pass almost unchallenged, and that the most modern of our codes of procedure should only modify Justinian's rule in what is really a retrograde direction, by taxing costs between party and party on a scale lower than that enforceable between solicitor and client, and by leaving it to the discretion of the court to say whether costs shall or shall not follow the event.

The effect of our taxing system was well shown by the newspaper correspondence arising out of *Worsley v. Labouchere*, a libel case in which the plaintiff obtained a verdict for £150, and judgment for the same with costs. The costs having been taxed between party and party, and paid as taxed, he found himself £300 out of pocket on the whole transaction. An indignant letter to the *Times* (Feb. 2, 1894) elicited a reply from Mr. Labouchere's solicitors in which it was incidentally mentioned that that gentleman had, as proprietor of *Truth*, paid from first to last over £30,000 in defending

<sup>1</sup> In the early sacramental procedure these took the form of deposits, returned to the winner, forfeited to the state by the loser. The accounts of the formulary procedure give no hint of any payments to the state or to its officers.

<sup>2</sup> Finlay, *Greece under the Romans*, vol. i. p. 201.

actions for libel in the public interest, *in nearly all of which he was successful*. Of course it does not follow that the whole of this deficiency represented the difference between costs recovered and costs paid to his own solicitor. Very likely it was due in part to the insolvency of unsuccessful plaintiffs; a contingency, by the way, which annihilates the benefit of Justinian's rule whenever it occurs.

As for judicial discretion, it is perhaps open to doubt whether its exercise in favour of unsuccessful litigants has ever yet done more good than harm, unless from the point of view of those who think it a good thing that a judge should be able to nullify indirectly the verdict of a jury with which he disagrees; which was the virtual, though unavowed, effect of *Harnett v. Vise*, 5 Exch. Div. 307 (1880). At all events, the late Sir George Jessel stood on firm ground when he insisted in *Cooper v. Whittingham*, 15 Ch. D. 501 (1880), that the discretionary deviations should be limited to cases of misconduct by the successful party in the litigation itself, as distinguished from misconduct in the transactions out of which the litigation arose, which is equivalent to saying that the only question left to the judge's discretion should be, whether the costs are to follow the general event in the lump, or to be apportioned according to the event of each separate stage in the proceedings. But the concluding passage of his judgment has a more special significance for our present purpose.

'I have often remarked, that there is an idea prevalent that a defendant can escape paying costs by saying, "I never intended to do wrong." That is no answer, for, as I have often said, *some one must pay the costs, and I do not see who else but the defendants who do wrong are to pay them.*'

Quite so. On the current assumption that the state has no duty in relation to civil justice beyond selling the commodity at cost price, (or perhaps, as formerly in England and now I think in India, rather above cost price), there is nothing for it but to treat one or other of the litigants as a wrongdoer, not only in respect of the original subject of dispute, which of course is right enough where judgment is against the defendant, but in respect of the litigation itself, which is a very different matter.

It is of the utmost importance to the proper understanding of the subject that this distinction should be carefully attended to. It is well illustrated by *Garnet v. Bradley*, 2 Exch. Div. 349 (1877), 3 App. Cas. 944 (1878). That was an action of slander, tried before a jury, in which the verdict was for the plaintiff, with farthing damages. In other words, the original wrong was held to be trifling in the

extreme. The judge made no order as to costs. The Master considered it his duty, under the terms of what was then Order LV, as interpreted by a previous decision, to give the plaintiff his full costs. Now, what was the *dolus*, or *culpa*, on the defendant's part by which he incurred this liability? It consisted in failing to distinguish a wrong of hardly appreciable magnitude from no wrong at all. The amount of damages claimed is not stated in the Report, but we may be pretty sure that it represented a great many farthings. If he had paid this demand without question, he would have done an injury to the public, as well as to himself, by encouraging the sort of people who trade upon their own shady characters, and pounce upon some unguarded expression of honest indignation as a pretext for extortion. If he had tendered the farthing before action, he would have been strictly within what the jury held to be his right. Surely, then, if this were the whole story, it would be a somewhat arbitrary legal fiction to reckon these costs as compensation for a wrong done by the defendant to the plaintiff; but it is not the whole story. The defendant was advised to question the correctness of the Master's order. The judge at chambers referred the matter to a Divisional Court, which declined to interfere. The defendant then went before the Court of Appeal, which reversed the judgment of the Divisional Court, but only by two judges against one, all three recognizing that the point of law was a very doubtful one. It was not to be expected that the plaintiff would acquiesce in this judgment, considering that he had, so far, three judges for him to two against him, besides a previous decision by two other judges raising almost exactly the same point. He naturally took the case up to the House of Lords, and was rewarded at last by the unanimous, but not unhesitating, judgment of four Law Lords in his favour, the defendant being ordered to pay the costs of all the proceedings from first to last.

Now, even granting that the costs as originally taxed by the Master were a just penalty for disputing a liability of one farthing, by what misconduct did he deserve the additional penalty representing the cost of (virtually) three appeals? All that can be laid to his charge is that he endeavoured to escape from a liability from which the jury in all probability intended to save him by their verdict, and that on a highly technical point of construction he had the depravity to agree with two learned judges, and with the first thoughts of two others, as against the second thoughts of the latter two and the opinion of five other, possibly not more learned, judges. But it would have been harder still to make the plaintiff pay his own costs, he having had the good fortune to agree with seven



judges out of nine (or, counting the previous decision, nine out of eleven).

Still (to repeat Sir George Jessel's remark), somebody must pay these costs, and who should that somebody be, if not either plaintiff or defendant? The two judges who gave occasion to the appeal by the honest exercise of an independent judgment? Or the draftsmen who omitted to repeal in express terms the old Acts relating to costs? According to my understanding of the matter, there was no wrongdoing on anybody's part, except the original farthingsworth of injury to the plaintiff's reputation. The long and short of the matter was that one of the contingencies had arisen for which litigation is the only, or the best, remedy hitherto discovered, with a view to which Courts of Justice are established, and the probable occurrence of which constitutes the main justification for the levying of taxes; namely, a conflict of wills between two members of the community, such as must constantly happen so long as human nature falls short of perfection, which the community in its own interest forbids them to determine by force of arms, and which it is bound in its own interest to determine as promptly and impartially as may be.

Why do we pay taxes at all, except for insurance against such contingencies? The return for our money is commonly supposed to consist primarily of external and internal security. The former need not here be considered, because its value depends entirely on the efficiency of the latter. We should prefer not to be protected against invasion, if our individual chances of being murdered, robbed, or cheated should unfortunately ever become greater under our national government than we might expect it to be under the rule of a foreign conqueror. On what, then, does this internal security depend? Partly, no doubt, on the amount of force available for the repression of whatever the community may hold to be wrongdoing; but much more on the efficiency of the machinery for ascertaining in any given case whether a wrong has been committed or not. The shipwrecked sailor in the story felt assured that he was in a Christian country when he saw a gallows; but to more reflecting persons no amount of penal appliances will afford a solid sense of security, even against the grosser forms of aggression, without accessible and efficient civil tribunals for settling disputes which have not yet ripened into crime.

The army and navy, the police and prison establishments, and the civil and criminal judiciary, are mutually interdependent parts of a single machine. No one of these parts will work in the way intended if any other part is out of order. Supposing you were wholly to exclude a particular tax-payer from the civil courts, as

likely as not he would get no return at all for his money through the other protective agencies. Any personal enemy would be able to ruin him with impunity, by threatening actions which he would be unable to defend, and by inducing his debtors to evade payment of their debts; nor would he in that case be much comforted by the reflection that the police would have come to his aid, had his enemy been fool enough to try the game of open violence. Fortunately this extreme point of injustice is seldom reached, and still seldomer known to have been reached. The present system of costs does not operate in such a way as to mark out any individual as absolutely excluded in all cases from the benefit of the civil law. What it does is to ensure that, in a large proportion of cases, the certainty of expense in the first instance, the uncertainty of ultimately recovering any costs in the event of success, and the improbability of recovering full costs, coupled with the risk of failure, which can never be wholly excluded, will render it more prudent to submit to injustice than to sue or defend, as the case may be. As it is not known beforehand who will be influenced by these considerations and who will defy them, aggression is kept within some bounds by the wholesome fear of catching a Tartar; but the evil tendency is unmistakable.

Instances will readily occur to any one of ordinary observation. Now it is a tradesman who tells you how much he has to write off every year for bad debts; now a capable workman temporarily out of employment, who could easily obtain credit from the baker and the grocer, but for the difficulty these small tradesmen have experienced in recovering from his fellow-workmen in like case. Or again it is an employer of labour, deterred from testing the legality of some new picketing device, by the knowledge that, whether successful or unsuccessful, he will be left to pay his own costs; or a body of creditors of an insolvent, forced to wink at the abuses incident to voluntary liquidation through dread of the expense of a regular bankruptcy. It is by no means exclusively a poor man's grievance; but whether the immediate sufferer be rich or poor, a far greater ultimate loss falls upon the general body of peaceable citizens, whose chances of a quiet life are increased by every dispute publicly investigated and rightly determined, diminished by every instance of wrong unchecked. ✓

The results of our inquiry may thus far be summarized as follows:

1. To make the successful party pay his own costs is a flat denial of justice.
2. To make the unsuccessful party pay the costs of his adversary is in many cases impracticable, and in many more cases so harsh that judges instinctively shrink from enforcing the rule. It is

a punishment bearing no sort of relation, unless it be an inverse one, to the magnitude of any fault that can be supposed to have been committed.

3. *Somebody* must pay these costs if we are not to relapse into anarchy; and the body which will feel the burden least, and reap the greatest proportionate benefit is—*everybody*.

4. If one attempts to describe the relation between the state and the tax-payer in terms of contract, any bargain which does not include gratuitous civil justice must be so essentially aleatory, must involve so uncertain a return for a certain outlay, that the public policy of enforcing it between two private individuals would be at least doubtful; while the fact that tax-paying is not purely a matter of free contract renders it all the more incumbent on the state to see that the terms offered are fair.

↑ One very common objection, however, still remains to be considered. It is said that the effect of making justice gratuitous would be to encourage an enormous growth of 'frivolous and vexatious litigation.' The former epithet seems to be a special favourite in this connexion, perhaps by reason of its ambiguity. If 'frivolous' means 'unimportant,' what is the test of importance? Surely not the mere amount of money claimed. To the individual the chief point is usually, though by no means universally, the proportion which the sum at stake bears to his total income; yet the man to whom a debt of £1 represents the amount of a week's wages will very likely be deterred from suing for it by the risk of losing as much again in costs, while the man to whom it represents the price of a single meal will not hesitate to stake twice as much on the result of any action in which his dignity is in any way involved. To the public the most important point is the legal principle involved; yet the kind of lawsuit which would develop into an instructive leading case is of all the most likely to be nipped in the bud through the unwillingness of the parties to face the cost of a series of appeals. Moreover, to the public, though not to the individual, triviality and cheapness go together. Given suitable procedure and a proper gradation of tribunals, the state could reckon confidently on disposing of a very large number of petty cases at a very trifling average cost; though an individual always runs the risk of an apparently simple case developing costly complications.

If, on the other hand, 'frivolous' means 'obviously unfounded,' there are much better means of checking such claims or defences than any manipulation of costs. A well-contrived code of procedure will ensure that a litigant who knows that he is in the wrong shall not go far without incurring the penalties of forgery, perjury, or

contempt of court. In India the plaint with which every suit commences must be accompanied by a written declaration that the same is true to the knowledge of the person making it, except as to matters stated on information and belief, and that as to those matters he believes it to be true<sup>1</sup>. And the Penal Code is so worded as to bring a false statement of this kind within the penalties of false evidence, besides providing a specific punishment for fraudulently or dishonestly making a false claim in a court of justice<sup>2</sup>. I have never been able to understand why this system, long ago recommended by Bentham, has not been introduced into England; in other words why a plaintiff is allowed to tell any number of lies in his plaint or statement of claim so long as he does not repeat them in the witness-box. But even in England the witness-box, the summing-up, and the verdict are reached at last, and then comes the time for fixing on the right shoulders the responsibility for wilful attempts to pervert the course of justice. The remarks of Mr. M. D. Chalmers on 'Petty Perjury,' in vol. xi of this REVIEW, may be read with profit in this connexion. He recommends moderate penalties, summarily inflicted, not by the judge before whom the perjury was committed, but by a magistrate to whom the presiding judge should commit. It may well be that the penal check will often be impossible of application, but in those same cases the present check in the shape of costs will be misapplied, and will produce the opposite effect to that intended. If something more than the mere fact of the jury having chosen to believe witness *A* in preference to witness *B* is necessary in order to convict *B* of perjury, certainly something more than the mere fact of an adverse judgment is necessary in order to prove a claim or defence to have been so 'frivolous' as to deserve a heavy fine<sup>3</sup>. But if an obviously unfounded claim, and one which only just fails of being established, are visited with the same kind of penalty, the latter generally proving the more costly of the two, what becomes of the supposed check?

And this brings me to the point which the practical Englishman is generally impatient to reach, what actually does happen in such cases? Unfortunately, if our practical friend desires statistical proof, he will have to be told plainly that no such proof can be given, and that any one attempting to give it would be self-

<sup>1</sup> Act XIV of 1832, sections 51, 52.

<sup>2</sup> Sections 191, 192, 209.

<sup>3</sup> A case which perhaps deserves special notice on account of its frequency is that of a debtor who refuses to pay on demand, but either pays or absconds as soon as he is served with a summons. It may be right enough that he should pay something to the state for giving unnecessary trouble, but the costs system encourages the practice by holding out the hope that the initial cost thrown on the plaintiff may deter him from taking action, and moreover makes it difficult to distinguish the dishonest evader from the person who would defend if he could afford to do so.

convicted of quackery. It is conceivable that tables might be so constructed as to show the rise or fall in the number of cases determined, side by side with the average cost of a single case, though the existing blue-books fall far short of even this. But what statistician will undertake to distinguish wholesome from unwholesome litigation? Before we can pronounce that it would have been better for the community if a given lawsuit had not been instituted, or had not been fought out, we must know what alternative course of action those particular parties would have pursued. A fair settlement arrived at by friendly discussion, sometimes even good-humoured acquiescence in some trifling imposition, may be better than litigation; but lawless revenge, and sullen submission to wrong, consoled as it generally is by aggression on some one else, and the slackened spirit of enterprise which results from an enfeebled sense of security, are much worse. The celebrated Sir William Jones addressed some wise words on this subject about a century ago to the grand jury of Calcutta:—

‘I never think lightly of the *petty complaints*, as they are called, which are brought before me. I know that wrath and malice will have a vent; that they are better spent in a court of justice than in black and silent revenge; and that, if such serpents be not crushed in the egg, there can be no security against the mortal effects of their venom.’

To judge which kind of litigation lawyers’ bills are most likely to check, the only practicable method is the *a priori* one of deduction from the known tendencies of human nature. I offer the following merely as illustrations of those tendencies, not as contributions towards a statistical demonstration.

*Tit-Bits* had a short article some time ago on ‘People who love going to law.’ Mention is made of a man who had figured as plaintiff something like 150 times in three or four years, one instance being an action about an old wooden post, ‘at a probable expense to each litigant of something like a couple of hundred pounds.’ As it takes two to make a lawsuit, he must in this and all the other cases have met an adversary as obstinate as himself. Another plaintiff sued a man for throwing a lighted fusee over his garden wall, and thereby destroying a favourite rosebud—a proceeding which the defendant could have stopped at once by tendering a shilling with an apology. But lest it should be supposed that these actions were encouraged by the comparative cheapness of modern law, a case is cited from some old law report, not specified, of nearly £400 spent in determining the ownership of a horn snuff-box, valued at fourpence, and a Chancery suit at the end of the last century between two Staffordshire potters, which lasted eleven

years and ended in the dismissal of a claim for £2 9s. 1d., with costs amounting to a thousand guineas. Can any one fail to recognize in these proceedings the operation of common and perfectly intelligible motives? A doubtful claim is resisted under the idea that the other man won't go to the expense of fighting; if the claimant persists, concession becomes more difficult because it involves payment of the costs of the summons or of the lawyer's letter; defendant thinks it better to play for double or quits, and so the game goes on. On the other hand it is natural to suppose that the hero of 150 lawsuits must have been encouraged in his career by numerous cases in which he did not meet his match in the game of bluff, but was able to replenish his war-chest by the spoils of more timid victims. In short, the litigious spirit in the bad sense of the term is closely allied to the gambling spirit, and is stimulated by every addition to the magnitude of the stake and the uncertainty of the game. It is only the better kind of litigious spirit, synonymous with hatred of injustice on the one hand and of violent methods on the other, which is likely to be encouraged by the prospect of speedy, thorough, and gratuitous investigation.

And here, for the present, I must conclude. Having regard to the limited space available, I was driven to the conclusion that everything else must be sacrificed to the one object of exposing the unsoundness of the fundamental assumption that 'somebody' (meaning one or other of the parties, preferably the unsuccessful party, but in practice often the victor) must pay the cost of civil justice, and of establishing the contrary principle that everybody has an interest in the just settlement of every dispute, and therefore that everybody should pay for the same in proportion to his means. I am well aware that my treatment of even this limited theme is very far from exhaustive. Nothing, for instance, has been said as to the clumsy and expensive substitutes for free justice to which we have been forced to resort; particularly the great mass of practically civil jurisdiction now entrusted to the unsuitable agency of police magistrates, and the huge army of inspectors enforcing vexatious regulations on good and bad alike, most of whom might be dispensed with if the civil liability for every case of actual mischief were ascertainable free of cost by a competent tribunal.

I am well aware also that a lawyer's bill is made up of very diverse elements, and that the claim for relief may be supported as to some of them by special arguments which do not apply equally to the others. Court-fees, and expenses of witnesses, stand on a different footing from skilled professional assistance, which again raises different questions according as it consists of advice or advocacy.

Something also depends on the nature of the litigation. Some, who might be impervious to the general argument above set forth, would perhaps admit the absurdity of leaving the settlement of points of law to depend on the chance of some private litigant choosing to stake his fortune on the issue. On the other hand, I am myself disposed to allow that there is much to be said for 'costs out of the estate' when it is a question of interpreting and carrying out a deceased owner's wishes. But believing as I do that the general argument holds good for all the different items of expenditure in most kinds of contentious business, I am content to submit it as it stands to the judgment of the profession, awaiting some other opportunity for the consideration of side-issues and of ways and means.

ROLAND K. WILSON.

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## THE RELIGIOUS EDUCATION OF CHILDREN.

**D**ISAGREEMENTS as to religious beliefs have ever been sources of much acrimony, and especially is this the case when the question turns upon the creed in which children shall be educated. It is not therefore surprising that when cases of this nature come before the Courts the evidence adduced should be both contradictory and personal, each side believing, and often with truth, that the other is solely actuated by a desire to proselytize. During recent years several striking cases have been decided on this subject and some conflicting opinions have been discussed.

The present neutral attitude as regards religious tenets has not always been maintained by the Legislature, for during the years when penal laws were relentlessly enforced against Papists, we find it enacted that no Roman Catholic could keep a school under penalty of perpetual imprisonment: further, all tutors in private houses were compelled to conform to the doctrines of the Established Church; and still more surely to guarantee that the Popish beliefs should perish of inanition, it was enacted that parents holding these views should not be permitted to send their children abroad for purposes of education. It is unnecessary to go further into this portion of the subject, for these disabilities have been annulled and in but few directions can we trace any mark of their existence. Certain limitations still exist as to the religion of the Crown, the holders of a few state offices and such like; but the Courts are now fully capable of looking to the general welfare of the child. So long as the creed is not *per se* one likely to harm the community as a body, no judicial interference will be made with a parent's education of his child in the faith he himself professes. Lord Eldon puts this clearly in *Lyons v. Blenkin* (Jac. 245; 23 R. R. 38), for he states at p. 256 (23 R. R. at p. 43) his view thus:—'With the religious tenets of either party I have nothing to do, except so far as the law of the country calls on me to look on some religious opinions as dangerous to society.' Should a parent therefore hold a creed which disregarded the ties of marriage or in some similar way trespassed against law and morality, the Courts would feel justified in stepping



in at the instance of an interested party and rescuing a child from such dangerous surroundings. In modern times, the believers in the creed of the 'Peculiar People'—a sect whose aversion to calling in medical aid has been severely criticized by many magistrates—might on occasion arising be included in the category of persons holding religious opinions dangerous to society. *Thomas v. Roberts* (19 L. J., Ch. 506) exemplifies another case where the Court has declined to give a father the custody of his child on the ground of his religious persuasion. There the father had joined an establishment called 'The Agapemone,' which recognized no Sabbath, denied the utility of prayer, and against which counsel made but thinly disguised charges of unchastity. The judgment of Knight Bruce V.C. in the case is a capital example of caustic judicial humour, and takes up ten pages in the report.

Although the Courts will not encourage the education of a child to views against public policy, they will do nothing to compel the inculcation of what can reasonably be held to be a Christian doctrine. There is no duty binding upon parents to bring up their children in any religious views whatever; assuming however that a parent has some creed of his own and has shown at the least some definite desire for his children's moral education, then it is abundantly clear that a father's wishes will be respected by the law. Difficulties rarely if ever arise where the husband being a man of religious views expressly states that his children are to be brought up in his own faith; but doubts are frequently raised where he is either indifferent, though nominally remaining a member of his sect, and dies leaving no expression of his wishes behind him; or where the mother or guardian deliberately disregard his wishes and bring the child up to some other belief. Notwithstanding the leaning of the Court to the father's creed, there are certain circumstances which will overcome this tendency, and in the determination of whether or no the facts of each particular case justify interference the most conflicting evidence has to be reconciled or rejected. A case has recently come before the C.A. which illustrates this difficulty. *Re Newton* (infants) '96, 1 Ch. 740 was an appeal from a decision of Kekewich J. refusing to order certain children to be removed from a Protestant to a Roman Catholic school. The father before marriage was a Roman Catholic, while his intended wife was a Protestant. By an ante-nuptial agreement the children of the marriage were to be brought up as Roman Catholics; but according to the evidence this was not insisted upon, for the children were educated as Protestants and attended a Sunday School of that denomination. The father subsequently gave way to drink and the two girls of fifteen and eleven before the Court

were neglected and ill-treated. A half-brother finding them in destitution removed them with the father's knowledge to a Protestant school. The mother subsequently died. Afterwards the father reformed and applied to Kekewich J. that they might be replaced under his charge and educated at a Papist school. The children having a small amount of property were made Wards of Court. Kekewich J. held and was affirmed by Lindley and Kay L.JJ. that it would not do to entrust the children to him again, that his conduct had forfeited his paternal rights and that both children must remain at the Protestant school where they then were. This case, being the latest one dealing with a most delicate branch of law, calls for consideration on the part of those having to determine in what creed a child should, under similar circumstances, be educated. The broad principles upon which the Courts proceed are clearly enunciated in the judgments delivered, and to these readers are referred. The case is in some respects stronger than the case to which allusion is next made, for it will be observed that here the father, with all the legal rights attaching to the relationship, was a living man and claiming his authority on the ground of conversion from his former evil habits, a circumstance of weight in deciding whether his children's welfare might be safely committed to his care. In the *McGrath* case (*sub*) both parents were dead, and accordingly this additional difficulty was removed.

Still greater difficulty is met in deciding another section of these cases, those in which the father has been indifferent all his life, and after his death the children have been brought up to a creed other than that to which he nominally adhered. Such were the circumstances which came up before North J. and ultimately before the C. A. in *Re McGrath* (infants) ('93, 1 Ch. 143, 67 L. T. Rep. 636). There a father had been baptized and died a Roman Catholic. His wife was at the time of his death a Roman Catholic also, but subsequently became a Protestant. One child of the marriage died and was buried in unconsecrated ground; other children went at random to Protestant and Roman Catholic schools and services: all these facts being obvious signs of no great religious enthusiasm on the part of the father. Before his death he never spoke upon these subjects or expressed any desire whatever as to their future. A benevolent lady found the family in great distress and placed certain of the children in a Protestant Industrial Home. At the mother's request she also consented to become their guardian. After the mother's death a Roman Catholic relative sought to remove the children from the Home and have them educated in their father's faith. The Court held that the father had shown complete indifference in religious matters, and that it was impossible

to blindly follow his creed without damaging the well-being of the children. That sentiments of indifference weigh heavily in these matters is well shown by the case of *Hawksworth v. Hawksworth* (L. R. 6 Ch. 539, 25 L. T. Rep. 115), which came up before James and Mellish L.JJ. in 1871. The father there was Roman Catholic and the mother belonged to the Church of England. The husband died leaving no directions as to the faith in which the infant should be educated. He had some children by a former wife, all of whom had been brought up as Roman Catholics. The mother having for several years educated the child as a Protestant, a suit was instituted to compel the mother to train the child in her father's faith. James L.J. at p. 542, after stating the facts, observes, 'There is not the slightest trace of any indifference on the part of the father to the religious education of his child. There is nothing to show that he would have acquiesced in the child being brought up a Protestant if he had been living. The rule of the Court is that the Court, or any persons who have the guardianship of a child after the father's death, should have sacred regard to the religion of the father in dealing with the child; and unless under very special circumstances, to see that the child is brought up in the religious faith of the father, whatever that religious faith may have been.' The Lord Justice proceeds to discuss the depth of the religious impression on the child of eight and a half years of age then before him, and concluded that such impressions were not so permanent as to cause a general unsettling of mind in altering them. In this conclusion lies the distinction—a very vital one—between this case and that of *Stourton v. Stourton* (8 D. M. & G. 760). That case had to do with a child of approximately the same age and was strongly relied upon in the *Hawksworth* case (*sup.*), as an authority to justify a refusal to interfere with matters as they stood. Both father and mother were Roman Catholics. After the death of the former, a posthumous child was born. Five years after the husband's death the mother became a Protestant, and from that time, until her child was about nine years of age, educated it in that faith. An action was commenced by Roman Catholic relatives to compel the child to be brought up in the father's belief, but Knight Bruce L.J. refused to accede to the claim. He found that the child was extraordinarily intelligent, and, to follow his figurative language, that it would be impossible to eradicate the Protestant tares without at the same time pulling up much valuable wheat with them. The Court therefore refused to grant in this case what was permitted in the later case of *Hawksworth* (*sup.*). The conclusion to be arrived at upon these cases and other cases before and after them (which are far too numerous to touch upon in

detail), may be stated to be that where a lasting impression has been made upon the child's mind, the Court will not interfere to divert it to its father's faith, but it will step in if the application be made within a reasonable time and the impression be not so deep as to unsettle the child for life. There is a strong presumption in favour of a child being brought up in the father's creed, and before the paternal rights will be abrogated there must be adduced very potent evidence of waiver, abandonment, or indifference.

No better proof for these propositions could be mentioned than by reminding ourselves that all contracts between parties before marriage—even though the marriage be in consideration of them—to the effect that the children of the union should be brought up in a faith other than the father's are invalid. The breach of such a contract will not entail liability for damages at Law or a decree of specific performance in Equity. Such rights are given to a father not for his own sake, but for the sake of his children. One of the leading cases on this subject is *Andrew v. Salt* (L. R. 8 Ch. 622, 28 L. T. Rep. 686). That was a case of a mixed marriage preceded by an agreement that sons should be brought up as Roman Catholics and girls as Protestants. A girl was born during the father's illness and was baptized with Church of England rites. The father being informed that this step was contemplated did not (according to rather conflicting testimony) appear to object, but wrote saying that a Roman Catholic priest would call. No such priest did in point of fact call. Subsequently the father made a will and directed thereby that 'my children shall be baptized and brought up as members of the Roman Catholic Church.' An action being brought to enforce the education of the child as a Roman Catholic, it was held that the agreement was not valid, and further, that the child had not imbibed the distinctive tenets of the Church of England to such an extent as to render a change harmful. Notwithstanding this finding, it was held that the child should be brought up in the mother's creed on grounds of expediency and the welfare of the infant. As regards agreements, although useless to enforce their primary objects, they are important in a secondary degree, for the Courts look upon such as a valuable indication when considering the question whether a father has abandoned his rights or not. The case lays it down that where no abandonment is shown then the mere fact that a child will be better off or more contented under other people's care will not justify education in a creed other than the father's; on the other hand, when such abandonment is proved, the whole question turns upon the welfare of the child, and it may be educated in a creed not its father's even though a change would not be detrimental to its

peace of mind. This is clearly shown also in *Re M<sup>c</sup>Grath, Stourton v. Stourton* (*sup.*), and *Re Agar-Ellis* (24 Ch. Div. 317, 50 L. T. Rep. 161).

What then forms the 'welfare' of the infant? This point is quite clear. It includes both material and moral benefit. This benefit must be looked to as a whole, neither pecuniary nor moral considerations apart from each other being regarded, but these and the leaning of the child's affections will all be weighed together. The temporal interests of the children were carefully guarded in *Re M<sup>c</sup>Grath*, while the dangers of making them all important were pointed out in *Talbot v. Shrewsbury* (4 My. & Cr. 672, at p. 688) by Lord Cottenham. He said, 'If the Court were ever to exercise that discretion, it would be very difficult to say what was to be the extent of pecuniary benefit which should require the Court's interference—what was to be the price of the child's faith. It would be fraught with extreme danger.'

To ascertain how far a child's affection has passed from its parents to others, and also to discover how far its mind has been imbued with religious impressions, the Courts have frequently interviewed the children. This course was adopted in the *Stourton* case (*sup.*) and many others down to *Re M<sup>c</sup>Grath*, but of late there has grown up a dislike to this course, partly perhaps for the reasons mentioned in the *Hawksworth* case (*sup.*), that it tends to encourage controversial opinions in minds of tender years, and still more on the grounds indicated by North J. in *Re M<sup>c</sup>Grath*, viz. that a child is often so nervous that no useful opinion can be formed. Vide also *Agar-Ellis v. Lascelles* (24 Ch. Div. 324, 39 L. T. Rep. 380).

In conclusion, the whole subject is one beset with difficulties. It may be true that if a mother is to be permitted to educate her child in some faith other than the father's, it will grow up convinced that its father's religious views were mistaken: this however would seem to be a lesser evil than, in the words of Wickens V.-C. in *Hawksworth v. Hawksworth* (*sup.*), 'to create a barrier between a widowed mother and her only child; to annul the mother's influence over her daughter on the most important of all subjects, with the almost inevitable effect of weakening it on all others; to introduce a disturbing element into a union which ought to be as close, as warm, and as absolute as any known to man; and lastly to inflict severe pain on both mother and child.' The learned judge did not disguise his disapproval of the doctrine of following the father's religion where there might be consequences of such a serious character. It is pointed out in Simpson 'On Infants,' at p. 130, that nothing short of new legislation can alter the rule

concerning ante-nuptial agreements as to the religious education of children. It has been recognized in the Poor Laws and remains unaffected by the Guardianship of Infants Act, 1886: nevertheless it does seem an absurdity that to protect the religious reputation of a dead father, it should be allowable to depreciate the opinions of the surviving mother.

J. H. JACKSON.

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## LEGAL EDUCATION AND THE UNIVERSITIES.

**A**GREEING in the main with Sir F. Pollock's suggestions as to a scheme of legal education, and in great part with Professor Goudy's memorandum on law teaching in the Universities, contained in the January number of the REVIEW, I venture to lay before readers of that number certain additions and qualifications which appear to me important. My own views being based almost as much upon my experience of teaching and examining in London as in Cambridge, I cannot put them forth as those of the legal faculty of my University in general. But I believe my academical colleagues are unanimously with me as to the importance which should be attached to the earlier part of legal study as conducted at the Universities.

It is obviously necessary that, in any scheme for legal education which is to be of national extent and utility, a leading part must be taken by the two bodies which admit to practice. And, as it can hardly be expected that these bodies will ignore the recent work of their own educational councils, I would suggest that the regulations made by the latter must be accepted, as far as possible, by all who entertain a reasonable hope of reform. A considerable step has lately been taken by the Incorporated Law Society, in the admission of University certificates as an alternative to their own intermediate examination. On the other hand, an opinion is somewhat widely held that the Inns of Court might with advantage take such certificates and degrees, at any rate for the earlier stages of study, into much more account than they at present do.

The importance of the *order* to be observed in a course of legal education is justly pressed by Professor Goudy; and it would, in my opinion, be a great improvement on the present system of the Inns of Courts to have the more general and introductory part made, by a prescribed interval of time, to precede the more particular and practical. This would be merely the imperative application of a principle already recognized by the Council, in the option allowed of passing in Roman and constitutional law separately. The definite assignment of these subjects, with perhaps another, to a first part examination, which should *not* immediately qualify for a call to the bar, would have two beneficial results. In the first place, it would obviate the present necessity for holding an

examination in the subjects concerned before every opportunity of call, and so far diminish the number of examinations in the year, which I think must be regarded as an inconvenience, if not an evil. In the second place, it would mark out a preliminary area, within the whole of which an alternative qualification might, I submit, be not unreasonably allowed, in the shape of certificates from extraneous educational bodies.

With regard to the more purely practical half of legal training, while its foundation might admissibly be laid at a University, there can be no question that its completion should be the peculiar function of the bodies which admit to practice; and that the testing, in this respect, of qualifications for such admission should belong to them exclusively. But the introductory or more purely educational half, in which also there can be no doubt as to the propriety of instruction being provided by the legal bodies, would yet seem to fall, even for men whose object is solely to become barristers or solicitors, quite as much within the province of the academical. As matter of general policy, the attraction of University men to legal practice and the encouragement of legal study at the Universities are correlative measures, the advantage of which is practically admitted on all hands.

The determination of the subjects which should belong to the first part rather than the other, does not present very much difficulty; but, when we come to the regulation of their study by the tests to be imposed, questions arise at once, on which I fear that my own opinion may be little acceptable either to my University friends or to the Council of Legal Education. On the one hand, I consider Professor Goudy's axioms to be rather counsels of perfection than practicable rules. On the other, I regard the present requirements made by the Inns of Court as somewhat unsatisfactory, alike in the subjects made compulsory, in the tests imposed, and in the degree of encouragement given to intelligent and interested study.

English constitutional law and legal history would be placed in the first part by general consent, and I rejoice to see them made a compulsory subject. Many would connect with these the older part at least of property law. Indeed, there are strong reasons for placing a view of English law in general, down to a period something like the end of the last century, in this first and more educational stage.

The proper position of public international law—still more of private—is rather questionable. The basis or theory is matter of elementary jurisprudence; the cases which give that theory its living interest often postulate a knowledge of rather minute



modern law. This subject, however, being rightly treated as a voluntary one, I need not dwell upon the question of its place, which seems to me to be, on the whole, rather in the so-called theoretical than the practical part of legal education.

There remain to be considered Roman law and jurisprudence—the portals through which I quite agree with Professor Goudy that our student of law should enter, if we can make him do so in a proper way. The most difficult question, to my mind, in the whole of English legal education is what to make of these subjects, which do not bear directly upon the future work of an English barrister—still less, perhaps, on that of an English solicitor—which do not therefore recommend themselves to an eminently practical-minded generation of students, and which an increasing number of high-class lawyers nevertheless regard as a most desirable foundation of study.

It may be noted that the Incorporated Law Society have shown, so far as I know, no disposition to include the three last-mentioned subjects—international law, Roman law, and jurisprudence—in their course, so that the undoubtedly desirable co-operation of that body with the Inns of Court apparently fails at once as to our proposed first part, unless the Inns of Court are prepared to give these subjects up altogether—a retrograde step which none would deplore more than myself.

Experience, however, both as lecturer and examiner, has long since led me to question whether Roman law and jurisprudence, with which international law seems to be most conveniently classed, ought not to be honour subjects only. A pass examination in Roman law, compulsory upon all candidates for call to the bar, with the too probable consequences of whittling down some textbook to the smallest possible dimensions, and making the largest possible allowance for ignorance of Latin and the like, may—I should almost say must—ultimately result in mere cram; and I cannot conceive a worse waste of time. The same remarks apply even more strongly to jurisprudence, which indeed never has been made a compulsory subject<sup>1</sup>.

Before drawing my conclusion as to the compulsory subjects, I should like to say a few words on the *tests* to be applied. For this purpose the persistence of examination, as at least one part of the conditions for admission to practice, has been assumed. I have no more love for examinations than Sir F. Pollock, but I think that it will not be found possible nowadays to dispense with them, as guides to a course of study; and I also think that they can, if carefully scrutinized and regulated, be made a test of genuine knowledge.

<sup>1</sup> [I entirely agree.—Ed.]

Their utility, however, in the latter respect is materially diminished by their multiplication. The perpetually recurring necessity of setting questions on the same subjects—for some subjects *must* be standing ones—seems to myself, who have had considerable experience in examining, so great a fault in the present system of the Inns of Court as almost to justify, against what has been said above, the abandonment of examination altogether. The doubling of a subject, for pass and honours, is open to much the same objection, as I have found in continuous examiner's work for the University of London. All examinations should, to my mind, consist, to a considerable amount, of unseen passages, problems, and essays; and the distinction between pass and honours, where required, should be made partly by the addition of extra subjects for the latter, partly by requiring a higher standard on the same papers. Of *viva voce*, which I at least have found a great tax on the examiner, my own experience is decidedly unfavourable. Its best, if not its only, use appears to me to lie in settling questions of pass where the result of the written examination is doubtful: and, for this purpose, it is not easy to keep the candidates in hand until their papers are looked over<sup>1</sup>.

My conclusion, as to the first part of the examination for the bar, is that it should include constitutional law and legal history, with some treatment of English property law or English law in general, as compulsory matter: that Roman law, jurisprudence, and international law should be additional but voluntary subjects: and that a standard which cannot, barring accidents, be attained by mere book-work should be required in every case. Candidates who attained such standard in *all* the subjects should be deemed to gain honours, and be granted certain recognized and substantial advantages over the pass men who merely attained it in the compulsory subjects—such advantages as the allowance of seniority on call to the bar, and shortening of the time to elapse before call; immediate call being, of course, incompatible with the subsequent training and testing in practical law. Obviously, as a mere question of arithmetic, those alone who took the *whole* of this examination would be competent to obtain what studentships and other rewards might be conferred on individuals for aggregate distinction in the first part; and this class of inducements would, of necessity, only be open to candidates who actually presented themselves for the Inns of Court examination. I shall have a word to say about them shortly. The advantages to be conferred upon the class of honour men generally

<sup>1</sup> [A *viva voce* examination before the papers have been looked over is, in my opinion, quite useless. At Oxford it is used, sometimes with considerable effect, to supplement or correct the results of the paper work.—Ed.]

are, in my opinion, a much more beneficial agency and should have a much wider scope.

These lines are written in the hope that the Inns of Court may be induced to treat the subjects above enumerated, or some of them at least, beside Roman law, as belonging to the more purely educational part of a student's preparation, which may be carried on elsewhere than in London. I have, of course, before me the reply of the Council of Legal Education given in 1894 to a memorial from the Oxford Faculty of Law, but I do not see that the change which I advocate is altogether inconsistent with the policy of that reply. No one questions the exclusive right of the Inns of Court to decide upon the practical qualifications in English law and equity which must ultimately be required for a call to the bar. Nor does the idea of a common Board of Studies or of Examiners appear very feasible, except perhaps for the joint recommendation and periodic revision of a list of books for students, which would be very useful. But as to the earlier part of legal study, whether we call it theoretic, scientific, or historical, while a little more substantive and separate recognition on the part of the Inns of Court might be desirable, it also seems reasonable that the recommendations of established educational bodies elsewhere should have some weight, and that the results of their training should carry with them some substantial advantage in the London course. An important step towards the mutual recognition of professional and academical tests has been recently made by the University of Cambridge, in throwing open the avenue to the degree of Master of Law to any graduate in arts who has qualified for legal practice. This may fairly be regarded, if not as a consideration, at least as a precedent.

The recognition, already referred to, of University certificates by the Incorporated Law Society, only grants the equivalent to a pass, and it may seem too sanguine to hope for more from the Inns of Court. Still, the object of the latter body has throughout been, not only to secure a training in the practice of law, but to encourage the study of subjects which exclusive attention to that practice has, in past times, rather conspicuously crowded out. The admission of honour men in University legal examinations to the privileges of honour men in the proposed first part of the examination for the bar, would be not only a gracious concession, but a furtherance of views which I for one believe the Council of Legal Education sincerely to entertain.

On the practical and final half of legal education, suggestions can only be offered by an outsider with the greatest deference. I think sufficient justice has scarcely been done to the teaching

provision made by the two great legal associations, particularly in the case of that made by the Council of Legal Education. Criticism is, of course, valuable; but broad censures passed by individual students ought surely to be endorsed with much caution on the part of high authorities, whose opinion has naturally great weight with the general public.

We may note, however, a significant hint given to students, by the Consolidated Regulations, on the great desirability of an addition to the means of instruction provided under the Regulations, in the shape of attendance in chambers. This hint was emphasized in the report of December, 1892. The value of such attendance is undeniable, but its expense is great, and we might hope that an organized system of practical teaching would render so considerable an outlay less indispensable than it once was. It has often occurred to me that some licensed instruction of this kind, on specified terms, much lower than the old fee, by gentlemen in moderate practice, would be a great addition to the scheme of lectures and classes. It also seems a question whether assistance given specifically in this direction for a year or two might not attain the object of good legal training better, and extend its benefits over a wider area than the two or three studentships given, as one may say, *in gross*<sup>1</sup>. We use, in University parlance, the term *pot-hunting* to express, amongst other things, a pursuit of prizes for learning, merely in view of their intrinsic value, without any intention of advance in the studies which those prizes were given to encourage. My acquaintance with the London students dates some years back; but I think I have perceived something of the same kind even amongst them.

E. C. CLARK.

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<sup>1</sup> [I have never met with any practical lawyer who believed that the existing system of prizes and studentships in the Inns of Court has had any beneficial effect whatever on the general standard of competence among candidates for the Bar.—ED.]

## REVIEWS AND NOTICES.

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[Short notices do not necessarily exclude fuller review hereafter.]

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*La guerre sino-japonaise au point de vue du droit international.* Par NAGAO ARIGA. Paris: A. Pedone. 1896. xiii and 310 pp.

THE fact that the author is professor of International Law at the Upper Military School at Tokio, and was legal adviser to the Japanese army in the Korean campaign, gives his book in some sense the character of an authoritative declaration of how Japan understands law as applied to war.

Among the many appreciative adaptations of European methods with which Japan has conquered the sympathy of Europe, none, indeed, has secured her more respect than her valiant and well-organized army. But she has other claims to different treatment from that extended to non-European States generally. She does not herself remain outside Western civilization while adopting its methods in intercourse with Europeans. Nor does she any longer carry on that intercourse with the aid of European counsellors. She now relies entirely on the intelligence of natives of her own land for the shaping of her destinies. Her student years are over, and she thinks the time has come when she can enter the community of nations as a full-grown state. Several European States in fact have already recognized that maturity by providing for the early suppression of that judicial extritoriality with which Western civilization marks its sense of superiority.

The most characteristic point in the conflict between Japan and China, as Prof. Ariga observes, was that of the two nations in presence, the one made no effort to respect the laws and customs of war, whereas the other did her utmost to conform to them (p. xi), and that, says Prof. Ariga, without any conditions of reciprocity, not as a duty to the enemy, but as an obligation to mankind (p. xii).

The difficulties of carrying out such good intentions were often almost insuperable. Prof. Ariga gives an instance of this in connexion with the conduct of the Japanese coolies. These coolies are men recruited by a contractor for the transport of munitions of war, catering, &c., and seem to form a sort of supplementary commissariat. They are subject to military law, take an oath of fealty similar to that imposed on the soldiers proper, wear a sword and uniform, and are organized on the model of the army itself. Marshal Oyama had issued a proclamation in Chinese to the inhabitants on the landing of his army at the mouth of the Ha-en-Ho, stating that the war was an affair involving relations of state to state, but

did not affect the people, and that consequently those who did not resist the army would be admitted to its protection, and he requested everybody to quietly attend to his occupations without fear of hindrance (p. 43). In spite of this proclamation, it was found that the inhabitants deserted their villages, and that their houses were broken open, their furniture destroyed, and everything of value carried off. An investigation resulted in the discovery that these ravages were committed by the Japanese coolies. To deprive them of their swords was to expose these men defenceless to attacks by hostile bands, and yet they had to be deprived of the means of perpetrating ravages which had worse than nullified the effect of the methods used to conciliate the native inhabitants. Marshal Oyama preferred the former alternative, deprived the coolies of their arms, and as a fact a number of them were afterwards killed by fugitive bands of Chinese (p. 50).

In spite of this, several fresh cases of outrage and murder committed at Kinchow after the capture of that town, traced to swords worn by Japanese officers, were attributed again to the coolies, who, having been deprived of their own swords, had made free with those they could lay hands on for nocturnal marauding (p. 61).

Another of the difficulties the Japanese army had to contend with was the distrust of the non-combatant population, who had expected to be massacred in cold blood after the fashion of Eastern warfare. Many men, women, and children were found killed along with the Chinese soldiers, and some women at the approach of Japanese soldiers put an end to their own lives. Later on, the mild practice of the Japanese towards the native population became better understood, and the Red Cross arm band inspired a confidence which even grew irksome when resulting in appeals to the wearers by all and sundry for the cure of ailments having nothing to do with war (p. 64).

In the treatment of the Chinese wounded on the field of battle (p. 114), and in that of their prisoners who had to be protected against outrage by an ignorant mob at Tokio, the Japanese, as in other matters, acted with humanity and in accordance with European practice (p. 106). The principle they applied as regards places of public worship, schools, and government establishments was to protect them. They did so, says Prof. Ariga, in the interest of mankind (p. 155). In the levying of requisitions (p. 163), as in all else, they were careful to conform to European usage. Everything was paid for cash down, though in this particular Prof. Ariga admits it was at the same time good policy to do so in a country where the native population only understood war as extortion and plunder (p. 164).

Interesting chapters are devoted to the mode in which the Japanese had to provide for the proper government of the occupied territory, to the utilization of native officials, to the provisions made for the health of the inhabitants, though also in the interest of their army, to the martial laws they had to enforce, to the negotiations for capitulation, &c.

The chapter of the book relating the dramatic surrender of Admiral Ting to his old friend Admiral Ito gives the touching correspondence between them which ended with the suicide of the Chinese admiral. Why Vice-Admiral Maclure, to whom Admiral Ting had confided the arrangement of the terms of surrender, though a foreigner, was not acceptable to the Japanese admiral, and a Chinese negotiator had to be appointed, Prof. Ariga does not bring out clearly.

A characteristic incident was an attempt made to respect the funereal prejudices of the Chinese. While the Japanese usage is to cremate the dead, the Chinese is to keep them in coffins of thick wood in the midst of the

living, and only to bury them after three years, when the decomposition is complete (p. 102). At first the Japanese buried the Chinese dead as the proceeding least offensive to the native prejudice, but the bodies had afterwards to be exhumed and burnt to preserve the army and native alike from disease.

To English readers probably the most interesting question which has arisen in connexion with the war is the position of the treaty ports. The open ports and circumscribed settlements are an institution confined to the extreme East. Were they to be considered neutral, or were they to be exposed like other Chinese territory to the fortunes of war? At the outbreak of hostilities, the foreign consuls residing at Seoul held a conference on the subject with the Japanese and Chinese ministers at the Korean ministry of foreign affairs. The British consul, seconded by the United States consul, submitted a proposal to 'temporarily neutralize' Seoul, Jinseng, Fusang, and Guensang. The Japanese minister pointed out that under a treaty with Corea the Japanese Empire had the right *de faire résider* its army at Seoul, and he could not admit that by any neutralization of Seoul the rights Japan possessed should be rendered illusory when war was declared between her and China. The United States consul then proposed to confine the neutrality to the open ports of Corea. The Japanese minister showed this plan to be unworkable, and the subject was dropped so far as Corea was concerned. The request to except Shanghai and its neighbourhood from military operations came from the British government direct, and it shows the good feeling which existed between the two states in question, and a self-denial which does Japan the greatest credit, that she acquiesced in a proposal which might have cost her the greatest inconvenience had the Chinese carried their resistance further than they did. Thus, while Japan was excluded from operations of war in or about Shanghai, the Chinese carried on the recruitment of their forces and the arming of their vessels there with impunity; after the battle of Yalu their squadron even anchored there beyond reach of their enemy. Thus the Chinese had a sanctuary on their own soil without any of the obligations of neutrals. Admiral Fremantle also raised the question of the neutrality of the open ports in a communication to the Japanese general *à propos* of an impending occupation of Chefow; but as the occupation did not follow, it was not solved either one way or the other. The French Government in 1884 and 1885 avoided carrying on hostilities near the treaty ports; but the grounds which may have weighed with France cannot fairly be urged against a Power placed in a different position, though, as a fact, Japan seems to have been impelled by similar ones as regards Shanghai.

The reader will have obtained some idea of the contents of this interesting book. He should be warned at the same time against treating the author's object lightly. Prof. Ariga claims for his country to rank in the conduct of war *pari passu* with the civilized Powers of the Old World, and he shows that the will to act as one was there. So far as adverse criticism of the war has gone, it has not shown more acts of cruelty than can be alleged in the case of any other war, while certainly Japan, striving to win the good opinion of Europe, has shown a conscious self-restraint which does her all honour, and has won for her the position to which she considered herself entitled.

THOMAS BARCLAY.

*Recueil général de la législation et des traités concernant la propriété industrielle. Publié par le bureau international de l'Union pour la protection de la propriété industrielle, avec le concours de jurisconsultes de divers pays. Tome premier: Allemagne, Autriche-Hongrie, Belgique, Bulgarie, Danemark, Espagne, France, Gibraltar, Grande Bretagne, Grèce, Îles de la Manche. Berne: Bureau International de la propriété industrielle. 1896. 8vo. xvii and 571 pp.*

THIS is a most interesting and useful work, which will be heartily welcomed by every one interested in international law. It will be complete in three volumes, and in its final form will contain an introduction by Monsieur Ch. Lyon Caen, of Paris, than whom there is no more competent authority in Europe on these matters. Some years ago (1889) M. Lyon Caen published a compendium of the copyright laws of Europe and America, entitled '*Lois sur la propriété littéraire et artistique*,' and the present work will form a useful pendant to that publication. Thus the subjects of the two great international Conventions of 1883 and 1886 on patents, designs, and trade-marks on the one hand, and copyright on the other, will have been worthily treated, and the legislations of the civilized world upon these matters placed in a convenient form within the reach of every student of foreign systems of law.

There is no very wide divergence in the general scheme of patent legislation among the nations of Europe. Thus, as to the duration of patents, the time allowed is much the same in most countries, e.g. Great Britain, fourteen years; France and Germany, fifteen years; Belgium and Spain, twenty years. The cost, for the full period, varies a little more, e.g. Great Britain, £99 (since 1892); France, £60; Belgium and Spain, £80. In Germany, however, it amounts to £265, and this heavy expense probably explains the prevalence of a dual system in that country, viz. patents proper and '*Gebrauchsmuster*,' or practical models, a kind of cheap and inferior patent, much what denization is to naturalization. Coming to questions of principle, it is to be observed that the fundamental difference between our patent system and that of France, for instance, is that whereas with us an elaborate machinery is provided for insuring, as far as possible, that a patent shall only be granted in respect of an invention which really presents an element of novelty, in France no effort of this kind is made whatever, the sole task of the authorities being confined to ascertaining that the demand is in the regular form, and is, on the face of it, a proper one. This is what is called '*le principe du non-examen*'; any one can have a patent if he asks for it in the proper form, but such patent will be granted to him entirely at his own risk, implies no guarantee whatever from the Government, and is not even *prima facie* evidence of the novelty of the invention. In this respect the Spanish and the Belgian law resembles the French, while that of Germany, on the other hand, is similar to our own in the publicity given to the application for a patent and the length of time allowed to elapse before it is finally sealed, with a view to giving the public an opportunity of coming in and opposing the grant.

It must be owned, however, that the consequences of this divergence in the point of view are of less practical importance than might at first sight appear, since, in both cases, the rights of any previous patentee are equally safeguarded by the power of petitioning the Court to annul the grant on the ground of anteriority.

There are many other interesting comparisons and contrasts to be made



between the different systems in vogue, both as to patents and trade-marks, but space forbids our dealing with them any further here, and we can only recommend those who may be interested in the subject to procure this book. The work, which must have involved very considerable labour, appears to us to be very well done, the translations are accurate so far as we have been able to verify them, and the introductions to the legislation of each country are clear, terse, and to the point.

The plan pursued throughout is to treat successively of patents, industrial designs, trade-marks, commercial names, unfair competitions, false indications of origin and unfair use of industrial rewards—an order which causes the compiler some trouble when he comes to the English Acts, never very conspicuous for methodical arrangement, and upon this subject, especially in the case of the Act of 1883, more than usually unsystematic in design.

The only criticism we have to make is that it would perhaps have been more practically useful, instead of proceeding in alphabetical order, to have grouped together the laws of the principal nations of Europe, and thus to have included in this first volume the legislations of Italy, Portugal, and Switzerland rather than those of Bulgaria, Gibraltar, and the Channel Islands. The objection, however, is not of much importance, provided the publication of the subsequent volumes be not too long delayed.

We may at the same time express a hope that the work, when finally concluded, will contain a careful and complete index. M. McI.

*The Law of Negotiable Securities.* Six lectures delivered at the request of the Council of Legal Education. By WILLIAM WILLIS, Q.C.  
London: Stevens & Haynes. 8vo. (9s.)

THESE lectures abundantly prove the great value to be derived from the scheme, which they inaugurate, of the delivery, under the auspices of the Council of Legal Education, by well-known practising lawyers, of short courses of lectures on special subjects which they have made their own. Every law lecturer and examiner knows the great difficulty of the subject of 'negotiable instruments' to those unaccustomed to see and handle mercantile documents, and more or less unfamiliar with the technical terms which have necessarily to be employed in their explanation. Much has been done to meet these difficulties by these spoken lectures, delivered in clear and vigorous language by one whose large mercantile practice has not merely rendered him familiar with all the practical aspects of his subject, but has enabled him to appreciate the confusion which has so often arisen from obscurity of thought and inaccuracy of expression.

The exact meaning of 'negotiability' is analyzed with masterly skill in the first chapter. *Simmons v. The London Joint Stock Bank* is fully criticized and examined. Our author points out the danger which has lately threatened the practical use of negotiable instruments in a mercantile community by the tendency on the part of certain Chancery judges to apply the doctrine of 'constructive notice,' or of 'putting on inquiry,' to securities whose value largely consists in the rapidity of the transactions in which they can be dealt with like money. He shows that if bona fides and value *per se* did not always give a good title, the essential characteristic of negotiable securities would be lost.

Having established his leading principles, our author proceeds to set forth what instruments are in fact negotiable, and discusses, with the help of very useful practical forms, which are embodied in the work, the legal consequences which result from the various matters which may respectively

appear either on the face of a bill of exchange or on its back. The cases cited are carefully chosen and limited in number. Old cases by which principles were established are preferred to recent cases in which they have been merely reaffirmed. Cases like Vagliano's, however novel or sensational, which deal with mere subsidiary points, are not even mentioned; but recent as well as older cases which show the treatment by the Courts of leading principles, our author most carefully examines, and urges his hearers 'to make a part of themselves.' The characteristic phraseology of the work recalls the tones, the animation, and the enthusiasm of the lecturer himself. Its contents will give a firm grip of the main principles of the subject to the student, the practising lawyer, and the intelligent man of business.

S. H. L.

*A Digest of the Law of England with reference to the Conflict of Laws.*

By A. V. DICEY, Q.C. With Notes of American Cases, by JOHN BASSETT MOORE. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. Boston, U.S.A.: The Boston Book Co. 1896. 8vo. cvii and 853 pp. (3os.)

WE hail the appearance of Prof. Dicey's long expected work. It proves to be an encyclopaedia not only of the English but also of the United States law on the matter, for Prof. J. B. Moore's notes are very full, and we need scarcely say that their learned contributor has a scientific position in his country equal to that of the principal author in England. Though Prof. Dicey calls his work a Digest its nature is rather that of a treatise, for the law digested is classified under the rules which the author has drawn up in order to express what he considers to be its principles, and not under the subjects that would have formed the classification of a digest as commonly understood. For example, the subject of bankruptcy is divided between chapter 8, which gives the jurisdiction of the English High Court in bankruptcy; chapter 10, which gives the extra-territorial effect of an English bankruptcy; chapter 17, which gives the effect in England of a foreign bankruptcy; chapter 28, which gives the law which governs administration in bankruptcy; and note 10 of the Appendix, which discusses the theoretical basis of certain rules on the subject. This distribution corresponds with the order of the rules under which Prof. Dicey, after treating of domicile and nationality, first embraces all that concerns the jurisdiction of the High Court, next the jurisdiction of foreign courts, and lastly the choice of law. And it is of no practical inconvenience to the professional man who has to consult the book without reading it through, for the ample index will direct him to what he wants, while the student who has leisure to use the book as a treatise will profit by the logical order which has been followed.

The rules are careful statements of doctrine, fortified by sub-rules and qualified by exceptions elaborated with as much nicety as the rules on which they hang, and after each the explanations and the cases are arranged under the heads of 'comment' and 'illustrations.' This is what might have been expected from the learned author's well-known book on Domicile, and it is countenanced by the form adopted in some of the Indian codes. But it may be doubted whether it is not a method better suited to legislation than to exposition, whether a more connected manner of writing and a less formal arrangement, which need not be less precise or accurate, would not conduct a student more easily into the heart of a subject. Especially perhaps is this so when the matter does not possess the certainty which it

is not only the business of a legislator, but also within his power, to introduce into a subject even when he does not find it there. And one caution, made necessary by the extent to which the style of modern English legislation has been adopted in the present treatise, may be given without hesitation. The professional man who consults the book by the aid of the index must not omit to turn to the 'interpretations of terms,' prefixed not only to the whole but to many particular chapters, or he will be liable to mistake the meaning of the rules which he seeks and finds.

Passing from questions of form to more weighty ones, Prof. Dicey's object, as the title of the book points out, has been to exhibit the doctrines on the conflict of laws which are received in England, or which it is likely will be adopted by the English courts as occasion arises for their discussing the matter further. It is not his object to exhibit the doctrines received on the matter in any foreign country, although so far as the United States are concerned this is amply done by Prof. Moore in his notes; nor, in assisting the further development of the matter in England, is he much influenced by any desire that a uniformity of doctrine in different countries should be attained. He mentions the fact that, where Acts of Parliament and English authoritative decisions are wanting, 'English judges look for guidance to foreign decisions, to the opinions of jurists, or to arguments drawn from general principles,' pp. 21, 22. But although it might be difficult to quote any passage expressly to that effect, we believe that we describe Prof. Dicey's attitude correctly, and as he would like it to be described, when we say that the general principles to which he prefers to have recourse are those which, whether they have been adopted elsewhere or not, appear to him best to co-ordinate actual English decisions into a consistent whole. He does not care to regard his matter as a branch of human thought, but he tries to find a line which, if English judges had perceived and followed it, would have led them to the same point which in some way or other they have reached, and he inquires to what further results that line will carry him. Such, unquestionably, is the right way of developing any branch of special English law, whether for the judges who have to determine its development authoritatively or for the text-writer who has to forecast the course which the judges will take. If indeed a line has been followed in the past which, prolonged in the mathematical sense, would lead to injustice or absurdity, both the judges and the text-writer will call a halt: but this will rarely occur. When, however, we have to deal with the English doctrines on the conflict of laws—a branch of English law, it is true, but one concerned with foreign persons and transactions—it would seem that the convenience of a general agreement over the world may be added to injustice and absurdity as another reason for which it may be undesirable to develop further a traceable English line, even though in itself it may be no less just and reasonable than the line which has prevailed abroad. But whatever may be thought as to this, it is difficult to overrate the value of having an English line on the conflict of laws sought for, and followed out when believed to be found, with single-minded devotion, by a thinker like Prof. Dicey.

Of course the attempt to trace an actual English line is not inconsistent with the adoption of certain general principles, were it only by way of trial. The methods of investigation in the natural sciences have so far worked their way into common thought, that every one knows a bold theory to be a step almost necessarily interposed between the first observations and a crowning induction. So, in his 'Introduction,' Prof. Dicey gives six 'General Principles' and a 'Sub-Rule' to one of them, by which

the theoretical value of his work will be judged. If the English decisions can be strung together on them without straining their language, he has accomplished the task which he has set himself of coordinating those decisions. If they should commend themselves to general reason, the jurisprudence of other countries also may benefit by a work which he was too modest to intend for those countries. But in any event the value of the book, as containing a thorough examination of the English and United States authorities, will remain.

The first of the six or seven principles above referred to is that 'any right which has been duly acquired under the law of any civilized country is recognized, and in general enforced, by English courts; and no right which has not been duly acquired is enforced, or in general recognized, by English courts,' p. 22. There is nothing peculiar in this. If indeed it were thought to furnish of itself a sufficient base for a system on the conflict of laws, Wächter's error, which Savigny denounced as an instance of circular reasoning, would be repeated. But our author makes no such pretension on behalf of the principle quoted. Besides that the others of the six or seven are not made to depend on this one, his comment on the word 'duly,' to which might have been added a comment on the words 'under the law' of a given country, shows that he is not blind to the fact that those words raise, as preliminary to understanding the principle, the very questions about the intended and admitted scope of laws to which an answer is sought in this branch of legal science. He is content with claiming for the principle in question that it 'does define the object in the main aimed at by rules having reference to the conflict of laws, or to the extra-territorial effect of rights'; and with observing that 'in hundreds of instances no difficulty exists in fixing what is the country under the law whereof a right (if it exist at all) has vested,' p. 32.

Another of Prof. Dicey's principles is thus stated. 'General Principle No. III.—The sovereign of a country, acting through the courts thereof, has jurisdiction over (i.e. has a right to adjudicate upon) any matter with regard to which he can give an effective judgment, and has no jurisdiction over (i.e. has no right to adjudicate upon) any matter with regard to which he cannot give an effective judgment.

'Sub-Rule.—When with regard to any matter (e.g. divorce) the courts of no one country can give a completely effective judgment, but the courts of several countries can give a more or less effective judgment, the courts of that country where the most effective judgment can be given have a preferential jurisdiction,' pp. 38, 40.

This, which may be called the principle of the most effective judgment, is probably our author's chief contribution to the theory of the science. We at first hoped to find in it his view of the base, theoretically needed, for the principle of respecting acquired rights. The rights to be respected should be those which had been acquired under the law of the country best able to define and protect them by an effective judgment. That view, so far as it made jurisdiction the basis of the choice of law, would have been in accordance with the historical development of the matter. But on further examination it does not appear to be Prof. Dicey's view. We understand what is said on p. 37 as laying down that the principle of the most effective judgment is concerned only with jurisdiction, and not with the choice of law. And although he puts on that principle the preferential jurisdiction which in England is allowed to the domicile for the purpose of divorce, we have not been able to find that he connects the preference allowed in England to the law of the domicile, as to personal capacity for

marriage or other contracts, with any preferential jurisdiction. Still, even within the limits assigned to it by the learned author, the principle may be one of great value if the obvious difficulty of measuring the degrees of the effectiveness of judgments, which must equally have been encountered had the scope assigned to it been wider, can be overcome. To estimate the measure in which that difficulty has been overcome—that is, the measure in which English decisions on jurisdiction and the conflict of jurisdictions really fall under the principle without strained interpretations of effectiveness—would demand a more thorough and patient survey than is compatible with the duty of giving to the legal public early notice of an important book. But the remark may be ventured that the principle does not seem to tell more in favour of the English preference for domicile than in favour of the preference for nationality, to which the new German civil code completes the adhesion of the most important countries of the continent. When the effectiveness of a judgment is used as the criterion for its recognition outside the jurisdiction in which it was pronounced, this must be understood of its effectiveness independently of any such recognition, or we shall fall into circular reasoning. Now marriage and legitimate descent are important elements in the determination of nationality, and a question of nationality must be determined by the state of which the nationality is claimed or imputed: no state can directly make a given person the subject of another state, or directly prevent another state from recognizing a given person as its subject, although, when once the recognition of foreign judgments has been introduced into the argument, it may indirectly do so by a judgment with regard to divorce or the capacity to marry. Hence a judgment with regard to divorce or the capacity to marry, pronounced in the national jurisdiction of the parties, may, independently of its recognition anywhere else, admit persons then in existence or thereafter to be born to the nationality of that jurisdiction, or exclude them from it. As soon as it is pronounced it establishes a datum of fact which the state in question will take into account when the occasion arises, and the occasion for taking it into account arises whenever the nationality of a woman depends on the lawfulness of her marriage so determined, and (if the state be not one which makes the primary claim to its nationality depend on the place of birth) whenever there are children from a marriage of which the lawfulness depends on the determination. But a similar judgment pronounced in the territory of the parties' domicile, in which they may not be, which they may abandon to-morrow if it is their domicile to-day, and where they may never have property, may have no effect at all independently of its recognition elsewhere.

Of Prof. Dicey's remaining General Principles, No. IV relates to the acquisition of jurisdiction by voluntary submission, and No. VI introduces the difficult question of the influence which the intention of the parties ought to exercise on the choice by the court of the law which is to govern a transaction. That question is further treated of in Rule 143, which is an interpretation clause explaining that the term 'proper law of a contract' is to be understood in the Digest before us as meaning 'the law or laws by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed, or (in other words) the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves'—Rule 148, which declares that 'the essential validity of a contract is (subject to certain exceptions) governed by the proper law of the contract'—the comments and illustrations subjoined to those rules—and the note 12 in the Appendix, in which we

presume that the term 'proper law of a contract' is to be understood in the same sense as in the rules. It is familiar to students of the matter that the English judges, in choosing the laws which were to govern contracts in several cases that have come before them, have laid a stress on the intentions of the parties as to the law with reference to which they were contracting which has probably not led them into any erroneous decision—for the decisions in the cases referred to may be defended on other grounds—but which may hamper them when they shall be confronted with a case in which the parties clearly intended to contract with reference to some law which would uphold their transaction, but of which the application to it cannot be admitted. The discussion of this subject, contained in the parts of the work before us which we have mentioned, presents an example of the ability which Prof. Dicey has brought to the task he has assigned himself. To give a full estimate of that discussion would require a separate essay, but, if we are not mistaken, the upshot of it is this. The intention on which the judges have built is refined into a presumed intention, to be deduced from all the circumstances, and to be attributed to the parties in spite even of a contrary expression by them. It is more than probable that our author is right, both as to the conclusion which will be reached when the case occurs, and as to the mode in which the judges will 'save their face,' or the face of their predecessors, in reaching it. The counsel who will have to argue on that side will need no better brief than Prof. Dicey's pages, and that is all which falls within the scope of eliciting a sound and consistent system from the English precedents. But after the refinement has been made some one will perhaps arise, even on the bench, to say that such a presumed intention is no intention at all, but a compendious expression for the circumstances that have been admitted to prevail over the only intention as to a choice of law which the parties entertained.

Lastly, we must call attention to the long and very practical note 17 in the Appendix, on the limits of taxation in respect of death duties and duties of income tax, and then take our leave, as a whole, of a book which must be before us in detail whenever leisure permits us to deal with any subject on which it treats.

J. WESTLAKE.

*Memorials, Family and Personal.* By ROUNDELL PALMER, Earl of Selborne. Two vols. London: Macmillan & Co. 1896. 8vo. Vol. I, xii and 476 pp.; Vol. II, viii and 515 pp. (25s.)

THESE two bulky volumes—an instalment only of the entire work—are a striking testimony to the thoroughness of Lord Selborne's character. It was no small task to sit down, at the age of seventy-three, to write an autobiography, but here is a great deal more; here are half-a-dozen biographies, interspersed with lengthy dissertations on current public topics. There is no member of the writer's numerous family (he was one of eleven children) to whom we are not introduced. Nor do these ample domestic details bore us, for the family is well worth knowing. His elder brother William, and his younger brother Edwin, were especially remarkable, each in his own way. His father was a model parish priest, greatly loved by his flock, and gifted with a manly and cultivated taste. It used to be said of Edwin Palmer, the late Archdeacon of Oxford, that he had missed his vocation, for that, with his logical power and exactness of expression, he would have made a first-rate Chancery barrister. It may be said with equal truth of his brother Roundell that if he had taken Holy Orders, as

at one time he thought of doing, he would have made a first-rate Bishop. His industry was untiring, his health left nothing to be desired, except that he suffered from occasional gout, and his piety and churchmanship were beyond all praise. He had, as few men have, a constant sense that he was in the presence of his Maker, and his success seemed to him to be not so much his own handiwork as the work of an overruling Providence. There are not many men of thirty-one who, when staying at a country house, would have written down, however much they might have felt, this passage: 'Add to this that my host is a Wykehamist, a botanist, and an admirable draughtsman; is married to a lady of the Ormonde family, *and that they have family prayers*, and you will understand that I could not do otherwise than highly enjoy my visit.' Of the genuineness of the sentiment we have placed in italics, the book before us furnishes abundant proof.

Roundell Palmer brought to London from Oxford a great reputation for scholarship and a good share of this world's advantages. His uncle was a Governor of the Bank of England, and he had connexions with the City which speedily procured him business. He began his professional career in the Chapel Staircase, Lincoln's Inn; afterwards removing to 11 New Square, where he held consultations with troops of clients for nearly twenty-nine years. He made it a rule, only to be departed from in cases of absolute necessity, never to read a brief on Sunday, but to consecrate that day to public and private prayer and to teaching the Bible to the young.

His first opportunity for distinction in the Courts came to him in 1839, two years after his call. He had been briefed to appear as third counsel in opposition to a motion for a receiver to be made on the equity side of the Exchequer in a suit to set aside a sale of a share in a partnership on the ground of fraud. The solicitors who instructed him were Messrs. Freshfield. Two counsel had already been heard on each side, when it was Roundell Palmer's turn to speak. Every practitioner of the present day sees at once that there was no chance for the success of the motion unless the plaintiff could make out that there was danger of the share he claimed not being forthcoming in the event of his establishing his case at the trial. Strangely enough, this point had not been taken by either of Palmer's leaders, and it fell to him to take it for the first time. When he had finished his argument, Baron Alderson, the presiding judge, wrote down a few appreciative words and handed them privately to Mr. James Freshfield who happened to be in court. This did not escape the notice of the Bar, and all the lucky junior's colleagues felt that his fortune was made.

When Palmer had been called a few years, the increase of his professional income was such as to raise a doubt in his mind whether he ought to retain the fellowship which he had gained at Magdalen. He resolved the doubt in a very characteristic way. Fearful lest when he took silk he might, like so many others, fall upon 'evil days,' he did not resign his fellowship, but he contributed its emoluments towards placing coloured glass windows in his College Chapel. Silk came to him five years later, but not with it a single 'evil day;' on the contrary, he continued to flourish more than ever. In 1861, he was appointed Solicitor-General, being out of Parliament at the time, his seat for Plymouth having been lost to him by a speech he made in condemnation of the second Chinese war and the bombardment of Canton by Sir John Bowring. The support which on this occasion he gave to Richard Cobden's motion against Lord Palmerston's government kept him in comparative obscurity for no less than four years.

As soon as he was made a law officer he found himself immersed in international matters of great importance arising out of the American War of

Secession. His history of this period stops, in the present volumes, at the year 1865, and is so full and so well told that we look forward with much interest to its continuation in the volumes that are to follow.

If Lord Selborne was not exactly a great man, he came very near to being one. His manner, indeed, was chilling to acquaintances, but he had a warm heart for his friends, and his love for his relations and family connexions knew no bounds. Mr. Beresford Hope once said 'No volcano burns within Sir Roundell Palmer.' This was true, and Sir R. Palmer would have been among the first to recognize its truth. While his memoirs are still incomplete we abstain from speaking of his career as a Cabinet minister and supreme head of that Chancery Division which he did so much to reform; but this much we may here say, that never were professional honours more honourably won or more meekly borne. The key to his estimate of high office appears in a letter he wrote about the time when he became Solicitor-General:

'One of my observations upon life is that small men get clownish and ceremonious when they are put into important positions, while with great men it is just the contrary. And it seems to me that to a man of really great capacity and great conceptions, who is not taken in by any of the world's false shows and idols, everything actually within his grasp must always feel small.'

A profound truth, which Aristotle might have put into his *Ethics* or Bacon into his *Essays*.

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*A Treatise on the Law of Contracts.* By JOSEPH CHITTY, JUN. Thirteenth Edition. By J. M. LELY. London: Sweet & Maxwell, Lim. 1896. 8vo. cvi and 806 pp. (30s.)

THE profession will cordially welcome a new edition of this well-known text-book, which has trained successive generations of lawyers in the law of contract. Both the present and the last edition have had the advantage of the patient industry and veteran experience of Mr. J. M. Lely, not only to prune away much that was obsolete and to incorporate much both of statute and case law that was new, but to bring the whole scheme and arrangement of the work somewhat more into harmony with more modern principles of classification.

It would have been impossible to have adequately carried out this last object without losing the original identity of the work, but Mr. Lely has provided us with an exhaustive and complete treatise on the law of contract, well up to date, in which the practising lawyer may seek enlightenment on almost any subject on which he desires to have a clear and accurate statement of the existing law.

We do not, however, agree with all the present editor's conclusions, nor is the work free from occasional blemishes. In regard to the question of 'penalty' or 'liquidated damages,' Mr. Lely, on p. 718, accepts the dictum of Jessel M.R. in *Wallis v. Smith*, limiting the generality of the rule in *Kemble v. Farren* to cases where one of the stipulations is 'for payment of an ascertained sum of money.' In the recent case, however, of *Willson v. Love*, '96, 1 Q. B. p. 626, the Court of Appeal have declined to accept this limitation, and have, in the words of Smith L.J., adopted 'the recognized opinion of the profession that, where a sum of money is made payable by a contract to secure . . . the performance of stipulations of varying degrees of importance, that sum is prima facie to be regarded as a penalty, and not as liquidated damages.' The same view had since *Wallis v. Smith* been previously affirmed by the



dicta of Lord Watson and Lord Herschell in *Elphinstone v. The Monkland Iron Co.*, 11 App. Ca. 332.

In regard to contracts by correspondence, the editor very guardedly states as his own view that an acceptance by letter may be revoked by a telegram arriving before the acceptance; but although this moot point has not been definitely decided, it is hard to reconcile this view with the decision in the *Household Fire Insurance Co. v. Grant*, or with the language of Kay L.J. in the recent case of *Henthorn v. Fraser*, '92, 2 Ch. at p. 34, that 'the contract was *complete* from the time that the letter was posted.'

In pointing out the two distinctions between bills of exchange and ordinary contracts on p. 452, the editor, as in the last edition, says the second distinction is 'that they are assignable.' The word he wants is clearly not 'assignable' but 'negotiable,' for otherwise he fails to point out as a distinguishing characteristic of such securities that a bona fide transferee for value may obtain a better title than his transferor.

Having regard to the utility and excellence of the work as a whole, we find far more scope for praise than for criticism. The index is excellent and the table of cases comprehensive.

The editor has been enabled to shorten the present edition by about 150 pages, chiefly owing to the reduction of case law by the passing of the Sale of Goods Act and of the Married Women's Property Act, 1893. Part of the space thus saved might we think with advantage have been devoted to the fuller treatment of the equitable branches of the law of contract; e.g. 'Undue Influence' is disposed of in four lines and without any reference to the cases of *Huguenin v. Baseley*, *Alcard v. Skinner*, *Morley v. Loughnan*. This somewhat scanty treatment of equity is no doubt due to the fact that the earlier editions of the work were mainly intended for common law practitioners before the Judicature Act. So much, however, has been done by careful editing to keep the present edition well up to the times that 'Chitty's Contracts' will more than ever be a book to which the busy practitioner will always turn and be sure of finding what he wants.

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*Cardinal Rules of Legal Interpretation.* Collected and arranged by  
EDWARD BEAL. London: Stevens & Sons, Lim. 1896. 8vo.  
xliii and 302 pp. (12s. 6d.)

THIS book is an attempt 'to collect and arrange in one volume the Cardinal Rules of the legal interpretation of *all* instruments.' In the first part the author makes some valuable, and, we may add, very practical remarks, as the authority of text-books and reported cases. He has perhaps hardly stated with sufficient distinctness the difference between a judicial decision on a point of law and one on a question of construction. A decision on a point of law, whether erroneous or not, is an authoritative statement of the law, and is binding on all persons till it has been overruled, so that if it is the decision of the House of Lords (which cannot be overruled) it creates new law. On the other hand, decisions on the construction of a document are, as our author points out (p. 9), 'useful when they lay down canons or rules of construction, and when they put an interpretation on common forms.' The author does not, however, where he discusses the authority of decisions, point out as clearly as he ought that a decision on the construction of a document of one nature is useless as a guide to the construction of documents of another nature, owing to the different circumstances of the parties. Possibly, however, he considered it unnecessary to do so, as the careful reader who grasps the fundamental doctrine (stated in

a subsequent part of the book) that the meaning of words necessarily depends on the circumstances of the persons who use them will discover the distinction for himself.

The author lays down the cardinal rule above referred to as follows (p. 35): 'The object of construing an instrument is to see what is the intention expressed by the words used. If from the imperfection of language it is impossible to know what the intention is without inquiring further, then we see what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view.'

The rule as thus stated is correct for practical purposes, but it appears to us that a theoretical objection of some weight can be raised to the form in which it is stated. If we omit technical words, the employment of which is restricted to some particular art or science, there is hardly a word in the English language which is not capable of being used in more than one meaning; and the meaning in which it is used depends upon the circumstances of the person using it. It would therefore perhaps have been better to have modified the latter part of the rule so as to show that in every case the circumstances have to be taken into account.

Some parts of this book are really excellent; the author's account of the effect of recitals (at p. 73), and of the construction of covenants (p. 78 et seq.), are at once accurate and clear.

Nearly 120 pages are devoted to the construction of statutes, in which questions of difficulty are treated of with much ability.

The only serious fault (if it be a fault) that we find with this book is that there is so little of it. We have read it with much pleasure, and we feel that it will be extremely useful to the profession.

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*The Medjellè, or Ottoman Civil Law.* Translated into English by  
W. E. GRIGSBY. London: Stevens & Sons, Lim. 1895. 8vo.  
x and 433 pp. (21s.)

THIS book, printed at Nicosia, in Cyprus, will, no doubt, be of much use to those who practise in the Courts of that island during the British occupation. Such, indeed, is its obvious *raison d'être*, for the code was promulgated in Turkish about twenty-five years ago, and has been translated into modern Greek, French, and (apparently) Arabic, yet no English translation has appeared until now. The present translation is made by Dr. Grigsby from the 'authorized Greek edition,' and has been revised 'from the Turkish original' by M. Nicolas Vitalis, Clerk and Translator of the Queen's Advocate of Cyprus. To the translation of the code itself is prefixed an English version of the Report of the Commission employed to draw it up, presented to the Grand Vizir for the time being, and dated March 10, 1869. This Report is of much importance, as setting forth the object and functions of the code, and it is especially interesting to admirers of Mahomedan law, who will find frequent mention of old familiar friends, Abu Hanifa, Shafei, Abu Yusuf, and others, though with names somewhat disguised by an unfamiliar method of transliteration, these three being called Hanefé, Shaphi, and Ebou Youssouf respectively. The general rules laid down in the old Arabian treatises, the authority of traditions from the Prophet and his followers, &c., are fully recognized, but a code is called for (so say, and wisely say, the Commissioners) by altered customs and social conditions, which make it difficult, especially as regards the 'Hanefite' branch of the law, to apply time-honoured principles to modern circum-

stances. An apt illustration is given: according to the 'ancient jurisprudence' it was sufficient to show one room of a house to an intending purchaser, because in old times all the rooms in each particular house were alike; but the 'modern school' requires that all the rooms should be shown, because, at the present day, 'every room has a form of its own.' The translator gives us no help in defining the scope of the code, as he has not taken the trouble to provide a table of contents; but the Report states that separate codes have been provided for some subjects, e.g. marriage, and modern commercial developments (such as bankruptcy and bills of exchange), and that the *Medjellè* is to be looked upon as a collection from the legal works of the 'Hanefite' school, 'which are of more importance for the acts which arise more frequently in transactions of our time.' This is somewhat indefinite; but a general inspection of the code seems to show that it deals with sale, pre-emption, hiring, &c., in a word, with business transactions generally, with the exception of those dealt with in the commercial code above alluded to. A glance at some of the provisions of the code serves to remind us of the purely equitable spirit in which the laws of Islam were conceived; it is laid down, for instance, by Article 1647, that a man cannot found a claim on two alternative grounds, one of which is inconsistent with the other—a principle which might have been copied with advantage by English lawyers, so as to make such pleas as 'never indebted and payment' impossible. Article 1808 forbids a judge to hear an action and decide for the plaintiff if the latter is his (the judge's) ascendant or descendant or wife. This is good as far as it goes, but cynics might suggest that a judge's decision *against* his own wife ought to be the subject of a similar prohibition! The Anglo-Cyprian printers have done their work well, so far as we can judge, but 'renowed' (p. viii) should be *renowned*, and 'worshop' (p. 362) *workshop*. We have mentioned that there is no table of contents; we may add that the index is so meagre as to be practically useless; the enormous price (for a book so small and cheaply got up) of 21s. must therefore be fixed, we suppose, on the principle that, as few persons will buy a book of this description, those few must be charged a high price if the book is to pay its expenses. We do not object to this principle in the abstract, but we do object to the issue of a book at such a price without table of contents and with a mere apology for an index.

*Die Behandlung der Verbrechenskonzurrenz in den Volksrechten.*  
Von Dr. HANS SCHREUER, Konzipienten der k. k. Finanzprokuratur für Böhmen. Breslau: Wilhelm Koebner. 1896. 8vo. xii and 299 pp. (Being No. 50 of the series 'Untersuchungen zur Deutschen Staats- und Rechtsgeschichte,' issued by Dr. OTTO GIERKE, Professor of Law at Berlin.)

THE word 'Konzurrenz' expresses a general conception of German criminal law which is quite unknown to our own. It denotes the state of things which arises when several crimes committed by the same person (whether by one act or by several) have been the subject of simultaneous judicial investigation and sentence has to be pronounced for them all together. The cases in which this may occur have been elaborately examined by the German jurists, and general principles for the direction of judges are to be found in the German penal code. In this country we have been content to leave the matter to the discretion of the individual judge, who is in general guided rather by the facts of the particular case than by any general considerations.

The work before us is a careful and detailed analysis of the rules on the subject which are to be found in the early Teutonic systems of law, including the Anglo-Saxon. Many of these rules are exceedingly curious, especially those which deal with punishment for personal injuries by fines assessed according to the amount of damage done. The work will be of interest in this country chiefly to students of Anglo-Saxon law.

We have also received:—

*A First Book of Jurisprudence for Students of the Common Law.* By Sir FREDERICK POLLOCK, Bart. London: Macmillan & Co., Lim.; New York: The Macmillan Co. 1896. xvi and 348 pp. (6s.)—The Preface to this book states that it 'is not intended to lay out a general system of the philosophy of law, nor to give a classified view of the whole contents of any legal system. . . . It is addressed to readers who have laid the foundation of a liberal education and are beginning the special study of law.' The first part of the book aims at setting out 'in language intelligible to scholars who are not yet lawyers, so much of the general ideas underlying legal discussions as appeared needful for the removal of the most pressing difficulties. . . . The second part of the book . . . is more practical and more exclusively addressed to students of the Common Law'; and deals with the sources of English law, the history of law reporting, and the authority of decided cases.

*Leading Cases in Modern Equity.* By the late THOMAS BRETT. Third Edition by J. D. ROGERS and J. M. DIXON. London: W. Clowes & Sons, Lim. 8vo. lviii and 399 pp. (16s. net.)—There is at least one more thing the editors of this book ought to have done: they should have changed the title to '*Notes on Leading Cases in Modern Equity.*' It would then have ceased to be misleading. In conjunction with the reports in which the text of the cases has to be sought, the notes may well be useful, though we are bound to say that those on restraint of trade and restrictive covenants as to the use of land, which we have examined as samples, are neither so clear nor so sound as they might be.

*A New Guide to the Bar.* By M.A. and LL.B. Second Edition. London: Sweet & Maxwell, Lim. 1896. 12mo. vi and 244 pp.—This little book does not aim at more than affording guidance of the most elementary kind to commencing students who have not any friends already in the profession. It is good enough for that purpose, but it might be improved by the omission of the first chapter, which is full of doubtful and controversial statements, and out of place in a practical manual.

*The Revised Reports.* Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and A. O. SAUNDERS. Vol. XXV, 1822-1826 (1 Russell; 2 S. & St.; 1 B. & C.; 2 Dowl. & Ry.; 1 Bing.; 11 Price; Dowl. & Ry. N.P.; 1 L.J.). London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1896. La. 8vo. xvi and 827 pp. (25s.)

*The Law of Torts.* By J. F. CLERK and W. H. B. LINDSELL. Second Edition by the Authors and T. HOLLIS WALKER. London: Sweet & Maxwell, Lim. 1896. La. 8vo. lxix and 733 pp. (25s.)

*Principles of Criminal Law.* By SEYMOUR F. HARRIS. Seventh Edition by C. L. ATTENBOROUGH. London: Stevens & Haynes. 1896. 8vo. xliiv and 569 pp.

*Journal of the Society of Comparative Legislation.* Vol. I. No. 1. August, 1896. London: Printed for the Society by Rivington, Percival & Co. 8vo. xxxii and 238 pp.—Among the contents are 'Legislation of the British Empire in 1895'; 'Modes of Legislation in the British Colonies'; 'The German Civil Code' (E. J. Schuster); 'Application of European Law to natives in India' (Sir C. P. Ilbert); 'to natives of Ceylon' (L. B. Clarence); 'State Legislation of America in 1895' (A. Gray).

*The Law and Practice of Building and Land Societies.* By the late HENRY F. A. DAVIS. Fourth Edition by J. E. WALKER. London: Sweet & Maxwell, Lim. 1896. 8vo. xx and 664 pp. (21s.)

*The Game Laws of England.* By G. TAYLOR WARRY. London: Stevens & Sons, Lim. 1896. 8vo. xvii and 384 pp. (10s. 6d.)

*A Tabular Précis of Military Law.* By Capt. A. D. FURSE. London: Macmillan & Co., Lim. 1896. 4to. viii and vii pp. (text of work not paged. (10s.).

*The Liberty of the Press in America, Germany, and France.* Paper read at the Annual Conference of the Institute of Journalists, 1896, by RICHARD J. KELLY.

*The Union of Judicial and Executive Functions in the Magistrates of British India.* By MANOMOHAN GHOSE. Two pamphlets. v and 46, v and 52 pp. 1896. Calcutta: W. Newman & Co.

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